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In The

Supreme Court of the United States

RICHARD G. TURAY,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is confined pursuant to a nominally "civil" state sexual predator detention statute. The statute bases such commitment in part on prior criminal convictions. Petitioner challenged his confinement in state court under the double jeopardy clause of the Fifth Amendment, the ex post facto clause of U.S. Const. art. 1. § 10, and the due process clause of the Fourteenth Amendment. In support of those arguments, he presented an extensive factual record proving that his conditions were prison-like and lacking in treatment. The Washington Supreme Court held that such proof was irrelevant, because only the language of the statute matters in deciding whether confinement is punitive and hence violative of those constitutional protections. The Ninth Circuit came to the opposite conclusion in *Young v. Weston*, 176 F.3d 1196 (9th Cir. 1999). This case presents the following questions:

1. Whether the double jeopardy clause bars a second commitment and incarceration for a single crime, after the first sentence for that crime is served, where that subsequent confinement is pursuant to a nominally "civil" sexual predator detention statute but occurs in prison-like conditions lacking in treatment?

2. Whether the ex post facto clause bars further commitment and incarceration for a single crime, after the first sentence for that crime is served, where that subsequent confinement is pursuant to a nominally "civil" sexual predator detention statute enacted after the crime was committed and the confinement occurs in prison-like conditions lacking in treatment?

QUESTIONS PRESENTED – Continued

3. Whether the due process clause bars commitment and incarceration pursuant to a nominally "civil" sexual predator detention statute, where the incarceration occurs in prison-like conditions lacking in treatment?

4. Whether the trial court's exclusion of evidence of unconstitutional conditions of confinement and the federal jury verdict in Mr. Turay's favor from his civil rights suit on this issue denied Mr. Turay the right to present a defense given the centrality of this evidence to the jury issue of placement in the least restrictive setting, its probative value on the question of whether total confinement of an organically brain-damaged man in need of intensive neuropsychological therapy at a facility lacking those resources was the best alternative, and given that the state's expert used Mr. Turay's threats to sue SCC to support its diagnosis of him as a sexually violent predator?

5. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court upheld a sexual predator detention scheme in part because of the state's continuing burden, at periodic intervals, to prove that detention met constitutional standards. The Washington Supreme Court's decision, however, upheld perfunctory, hearsay, non-jury, review hearings, lacking in appellate review. Does the limited, unappealable nature of these re-commitment proceedings conflict with *Kansas v. Hendricks*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard G. Turay requests that this Court issue a writ of certiorari to review the judgment of the Washington Supreme Court (Appendix A, App.1-55), which became final on December 22, 1999, when that Court's Order Changing Opinion and Order on Motions for Reconsideration were filed (Appendix G, App.118-20).

OPINIONS BELOW

Richard Turay was first confined and determined to be a "civil" sexual predator ten years ago. Judgment was initially entered on October 17, 1991 (Appendix B, App.81), but it was reversed for failure to require jury unanimity (Appendix C, App.83). Mr. Turay remained incarcerated and was retried; in October of 1994, he was again committed as a sexual predator (Appendix D, App.84). Thereafter, in April of 1995, the trial court decided motions concerning the constitutionality of his confinement that remained pending from before trial (Appendix E, App.86). It later rejected challenges to his continued confinement at a periodic review hearing (Appendix F, App.103).

The Washington Supreme Court granted direct appellate review of those decisions and also accepted Mr. Turay's simultaneously filed post-conviction petition presenting additional evidence. It decided the direct appeal on the merits and dismissed the personal restraint petition on October 21, 1999 (App.1). Mr. Turay's motion for reconsideration was granted and the state's was denied. The Order Changing Opinion and Order on Motions for

Reconsideration were filed on December 22, 1999 (App.118).

JURISDICTION

The Washington Supreme Court's final decision was filed on December 22, 1999. This petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The due process provision applicable to the states is contained in U.S. Const. amend. XIV, § 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The double jeopardy clause of the Fifth Amendment insures that "no person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . . " The ex post facto clause of U.S. Const. art. 1, § 10, mandates that "No state shall . . . pass any . . . ex post facto law. . . . "

Washington's "civil" sexually violent predator statute, Wash. Rev. Code 71.09.020, applicable to Mr. Turay's 1994 trial, defined "sexually violent predator" and the other terms contained in the commitment statute:

> (1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.
>
> (2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.
>
> (3) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.
>
> (4) "Sexually violent offense" means an act committed on, before or after July 1, 1990, that is (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties for forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the

> laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

The question the jury must answer, under Wash. Rev. Code 71.09.060(1), is "whether, beyond a reasonable doubt, the person is a sexually violent predator."

STATEMENT OF THE CASE

I. FIRST TRIAL

A petition to detain Mr. Turay pursuant to Wash. Rev. Code 71.09.090 was filed in 1991. He was committed on October 17, 1991. This decision was reversed on appeal.

II. *TURAY V. WESTON*, THE FEDERAL CIVIL RIGHTS CASE

In 1991, during the pendency of these sexual predator proceedings, Mr. Turay filed a 42 U.S.C. § 1983 suit in

federal district court challenging the conditions of confinement at the Special Commitment Center (SCC) for sexual predators. Following a jury trial, *he won*. The jury ruled that SCC provided constitutionally inadequate treatment and, hence, unconstitutional conditions of confinement. *Turay v. Weston*, C91-664WD. App.121.

Based on the jury's verdict, the federal district court granted injunctive relief in June of 1994. In 1995, following inadequate compliance by SCC, the federal court appointed a special master (selecting the State's proposed candidate). Since then, the special master has issued 16 reports. On November 15, 1999, however, after five years of missed opportunities, the federal district court held the State and SCC in contempt for failure to comply with the injunction. App.129.

As reflected in the November 15, 1999, contempt order, SCC remains constitutionally inadequate, with failings including poor medical care (App.136-37), lack of staff competence and inadequate staff training (App.137-38), underdeveloped treatment plans (App.138-40), unavailability of less restrictive alternatives (App.139-40), limited family therapy and involvement (App.140), and minimal everyday activities such as jobs, religious opportunities, educational programming, and recreation (App.144-46). DOC's influence over the SCC continues to be "pervasive and damaging." App.144. "The state has treated the SCC as an unwanted step-child of a medium-security prison." App.149. The State's lack of response to the injunction shows a pattern of underfunding (App.149), "entrenched resistance" (App.150), and "footdragging" (App.152). The federal court repeatedly notes the SCC's failure to meet recognized minimal

standards for treating sex offenders. App.147. The State's five-year track record of "intentional[ ] disregard[ ]" for the injunction and the constitutional rights of persons like Mr. Campbell warranted the district court's finding of contempt. App.152.

III. THE SECOND TRIAL

Trial Testimony. The state called three women who testified at trial that Mr. Turay raped them. Mr. Turay had been convicted of each of the rapes before, and had already done his time. There was additional testimony about another alleged rape, and about Mr. Turay purportedly attempting to push his way into a woman's hotel room.

The state then presented testimony of psychologist Dr. Dreiblatt. He opined that Mr. Turay suffers from "paraphilia not otherwise specified, rape, severe." He added that Turay suffered from dementia "as a result of head trauma that he has experienced as a young child and as a teenager." He explained "that [Turay] had experienced profuse significant damage, that he basically lost speech capacity, motor capacity, fairly wide ranging kinds of problems at that time." He further testified that Turay suffered an additional traumatic head injury in a car accident at age 17, "And there was a general consensus that he experienced brain injury compounding the earlier brain injury." Dr. Dreiblatt also stated that Turay had a substance abuse related disorder.

Concerning risk of reoffense, Dr. Dreiblatt testified that with "this new generation of studies we find that

people get fairly good predictability at about the 75 percent level." He contended "that more likely than not, if released, he would re-offend in a sexually violent way against adult or teenage females." On the separate question at issue in this trial, Dr. Dreiblatt testified "that it was not in the best interest of Mr. Turay or the community that less restrictive treatment alternative be provided."

Mr. Turay's lawyers then called Richard Turay's mother, who testified about the tragic accident which occurred when he was only two years old that caused his mental problems. She explained that Mr. Turay was hit by a car and, as she watched in horror, he was dragged 100 feet down the road. She ran to him; "And then I had to climb under the car to get him out." Turay was unconscious and a bloody mess, and rushed to Harborview Hospital. She was told "that he just didn't have any chance"; she consented to an experimental treatment; and Mr. Turay remained comatose for almost a month. When he finally woke up, he was like a little baby again.

At age 17, Turay was involved in another car accident. It left him unconscious, with a concussion and severe injury. It gave him headaches, spasms and seizures.

Dr. Frederick Wise, a psychologist specializing in clinical neuropsychology and forensic psychology, then testified that Mr. Turay suffered from organic mental disorder and substance abuse. He explained that this was the result of his early head injury, "several weeks of coma, significant arrest of normal developmental milestones like walking, talking, interacting, things like that."

Dr. Wise continued that Mr. Turay does not suffer from any kind of personality disorder, and "he doesn't fit the diagnostic criteria for it." In particular, he does not fit the diagnostic criteria for paraphilia, not otherwise specified, rape. Dr. Wise opined that Turay does not suffer from a mental abnormality or defect that makes him likely to commit crimes of sexual violence. He explained that "there is poor predictive validity for sexual violence or sex crimes in the future." The jury nevertheless concluded that Turay should be committed to SCC as a sexual violent predator.

Motions Concerning Conditions of Confinement. Numerous pre-trial motions challenged Wash. Rev. Code 71.09's detention provisions on equal protection, substantive and procedural due process, double jeopardy, ex post facto, and cruel and unusual punishment grounds.[1] The

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[1] Before his first trial, a voluminous motion to dismiss on equal protection, substantive due process, procedural due process, double jeopardy, ex post facto, and other constitutional grounds was filed. King County Sub No. 12A, 12B. It was denied. Sub No. 57. After that first trial, a motion for release based on the unconstitutionality of Wash. Rev. Code 71.09's pre-trial release provisions was filed. Sub No. 108. It was denied. Sub No. 119.

Additional motions to dismiss on constitutional grounds were filed in November of 1993, before the second trial. Sub No. 146, 147. A motion to dismiss because the punitive conditions of confinement rendered the sexual predator proceedings unconstitutional, requesting adoption of the record concerning conditions of confinement at SCC developed in *In re the Detention of Young*, King County Superior Court No. 90-2-21319-6, was filed on January 12, 1994. Sub No. 166. The motion to adopt the record in *In re the Detention of Young* was granted. June 1, 1994, Sub No. 188B. The *Young* case became

trial court did not decide Richard's pre-trial motions for release from confinement due to the unconstitutionality of conditions at SCC before trial. An interim ruling on those pre-trial motions was entered for the first time on April 4, 1995, after Richard was committed. Appendix E, App.86. That ruling made the following factual findings:

> * SCC is housed in a building designed as a prison (App.89);
>
> * SCC is operated under an interagency agreement with the DOC (App.89);
>
> * DOC provides SCC with necessary services like library, visiting rooms, medical care and meals (App.89); all external security and some internal security is provided by DOC (App.89-90); DOC is authorized to "shoot to kill" SCC detainees who attempt to flee (App.90);

Young v. Weston, 176 F.3d 1196, the one in which the Ninth Circuit just entered a ruling directly contrary to that of the Washington Supreme Court on the constitutionality of Wash. Rev. Code 71.09. Thus, both the *Young* case and the *Turay* case are based in large part on an identical factual record concerning the punitive conditions of confinement at SCC.

Further briefing was submitted in support of the motion to dismiss due to unconstitutional conditions of confinement. June 10, 1994, Sub No. 194. Mr. Turay filed his own, pro se, motion for release due to unconstitutional conditions of confinement. June 10, 1994, Sub No. 194. Mr. Turay filed his own pro se motion for release due to unconstitutional conditions of confinement. Aug. 16, 1994, Sub No. 230. He provided supplemental briefing on the conditions of confinement issue. Sept. 6, 1994, Sub No. 238. Additional motions to dismiss on due process grounds were filed. Sept. 19, 1994, Sub No. 248. A motion seeking to present evidence of the conditions of confinement to the jury was made. Sept. 27, 1994, Sub No. 261.

* space limitations and facility design make SCC more restrictive than most traditional prisons (App.90); in many respects, privileges and opportunities are less than what SCC residents experienced as prisoners (App.94);

* SCC's classification system is arbitrary, lacking in a coherent security or treatment rationale (App.91);

* despite expert advice, treatment-resistant detainees are housed with treatment-oriented residents (App.91);

* residents are subjected to strip searches, room searches and personal searches without reasonable suspicion, sometimes by their assigned therapists (App.91-92);

* no formal grievance process exists at SCC; rule enforcement is arbitrary and inconsistent (App.92-93);

* residents are allowed fewer visitation privileges than DOC prisoners (App.93);

* despite expert advice, SCC has no transition, work-release or aftercare program (App.93-94);

* SCC lacks key components of treatment programs upon which it purports to be modeled, including intensive group therapy run by competent therapists and structured treatment manuals for each program component (App.94-95);

* more sex offender treatment opportunities are available for prisoners in the DOC sex offender treatment program than for detainees at the SCC (App.95);

* SCC staff have been verbally abusive toward residents, have referred to residents by racial epithets, have solicited a resident to harm other staff, and have provided residents with pornography (App.99);

* SCC staff are inexperienced, insufficiently trained, and uncertified in providing treatment (App.96-97); and

* SCC fails to provide individualized treatment plans which include objective benchmarks of improvement so as to document, measure and grade an individual's progress (App.101-02).

While declaring conditions and treatment at SCC unconstitutional, the state trial court judge declined to release Mr. Turay, choosing instead to order equitable relief consistent with the pre-existing federal court injunction in *Turay v. Weston*, No. C91-664WD (App.102).

On appeal, the Washington Supreme Court held that conditions of confinement were irrelevant to whether double jeopardy, ex post facto, or substantive due process protections were being violated. App.43-53. It cited with apparent approval the state's argument that the constitutionality of the statute on its face cannot be challenged by inept application of the statute by the agency with responsibility for SCC's operation. App.44. The Washington Supreme Court went on to state that if those conditions mattered, then despite the initial findings of lack of treatment and hence unconstitutionality of the conditions of confinement, the federal district court had more recently ruled that SCC was making "good faith efforts to achieve compliance." App.3 & n.2.

REASONS FOR GRANTING THE PETITION

As the Washington Supreme Court acknowledged, its decision in this case conflicts with the Ninth Circuit's decision in *Young v. Weston*, 176 F.3d 1196 (9th Cir. 1999). This case presents an opportunity to resolve that conflict and to correct the erroneous Washington Supreme Court decision which was entered in the straightforward context of a direct appeal, rather than a collateral attack.

I. THE DECISION OF THE WASHINGTON SUPREME COURT UPHOLDING NOMINALLY "CIVIL" SEXUAL PREDATOR CONFINEMENT DESPITE THE PUNITIVE NATURE OF THE CONDITIONS OF CONFINEMENT STANDS IN DIRECT CONFLICT WITH A RECENT DECISION OF THE NINTH CIRCUIT ON EXACTLY THE SAME ISSUE

The decision of the Washington Supreme Court upholding nominally "civil" sexual predator confinement regardless of the punitive nature of the conditions of that confinement stands in direct conflict with the Ninth Circuit's recent decision in *Young v. Weston*, 176 F.3d 1196, on exactly the same issue – as the state Supreme Court explicitly acknowledged.[2] The Washington Supreme Court's purely linguistic approach also conflicts with this

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[2] App.51 ("We are not unmindful of the fact that the Ninth Circuit Court of Appeals has recently held that *Hendricks*[, 521 U.S. 346,] 'does not preclude the possibility that the Washington [SVP] statute, *as applied*, is punitive.' *Young v. Weston*, 176 F.3d 1196, 1999 (9th Cir. 1999). This court is, of course, not bound by that decision and, for the aforementioned reasons, we decline to follow it.") (emphasis and brackets in original).

Court's most recent approach to the evaluation of double jeopardy challenges in similar contexts. This Court has pointed to the "purpose *and effect*" of a statute as factors to look at in deciding whether it has a punitive character for double jeopardy purposes, in addition to statutory construction. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (even where legislature indicates intent to establish civil penalty, " 'we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' " " 'to transform what was clearly intended as a civil remedy into a criminal penalty' "); *id.* at 117 (Ginsburg, J., concurring) ("It seems to me quite possible that a statute that provides for a punishment that normally is civil in nature could nonetheless amount to a criminal punishment as applied in special circumstances. And I would not now hold to the contrary.") (emphasis added). Indeed, this Court in *Kansas v. Hendricks*, 521 U.S. 346, notes that the application of a civil commitment statute could be considered in deciding whether that law imposed punishment. *Hendricks*, 521 U.S. at 361-63 (discussing quantum of proof necessary to show confinement is punitive and hence unconstitutional). The direct conflict between the Washington Supreme Court's decisions, and the decisions of the Ninth Circuit and this Court in the same context, warrants review.

II. THE DECISION OF THE WASHINGTON SUPREME COURT HOLDING THAT THE CONDITIONS OF SEXUAL PREDATOR CONFINEMENT ARE IRRELEVANT CONFLICTS WITH DECISIONS IN ALL AREAS OF CONSTITUTIONAL LAW RECOGNIZING THAT CONTEXT – NOT JUST FORMAL LINGUISTIC ANALYSIS – IS RELEVANT TO WHETHER THE CONSTITUTION IS VIOLATED

The Washington Supreme Court's decision also conflicts with numerous decisions of this Court (and the lower courts) on whether context, rather than just statutory language, is relevant to the validity of a statute under the due process, double jeopardy, and ex post facto clauses. This Court has held that the application of a statute – not just a formal linguistic analysis – determines whether that confinement is punitive for ex post facto purposes. The ex post facto clause "forbids the application [by the legislature] of any new punitive measure to a crime already consummated." *Kansas v. Hendricks*, 521 U.S. 346, 370 (citations and quotations omitted). The manner in which the judiciary is *interpreting* that statute, however, is also considered in determining whether the constitution is violated.[3] Similarly, the manner in which administrative agencies *apply*

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[3] *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."); *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339, 342-43 (10th Cir. 1989) (same); *State v. Aho*, 137 Wash.2d 736 (1999) (violation of constitution for judiciary to apply new criminal statute to past conduct, despite lack of legislative intent to do so).

even a properly written statute is considered in determining whether ex post facto guaranties are being violated. This is clear from *Weaver v. Graham*, 450 U.S. 24 (1981), in which this Court held that a Florida statute which repealed an earlier law and thereby had the effect of reducing "gain time" for good conduct and obedience to prison rules, was an *ex post facto* law when applied by the prisons to prisoners whose crimes were committed before the statute's enactment – even though the prisons, not the legislature, were the ones who directed the new law to be applied to the old prisoners. Since that time, federal and state courts consistently hold that administrative agency action must be considered in deciding whether the ex post facto clause is violated.[4] The Washington Supreme Court's decision rejecting inquiry into context to determine if an ex post facto violation occurred here conflicts with these ex post facto decisions.

This Court has also considered context when determining the constitutional validity of a prosecution under the due process clause. In *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968), this Court ruled that the right of an accused to a jury trial is a "fundamental right, essential to a fair trial." In *McKeiver v. Pennsylvania*, 403 U.S. 528

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[4] *Jones v. Garner*, 164 F.3d 589, 593 (11th Cir. 1999) (examining retroactive effect of Georgia *regulation* on parole reconsideration), *cert. granted*, 120 S.Ct. 11 (1999); *Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991); *Stansbury v. Hennigan*, 265 Kan. 404, 413, 960 P.2d 227, 234 (Kan.) ("Political subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the Ex Post Facto Clause") (citations omitted), *cert. denied*, 525 U.S. 1060 (1998).

(1971), this Court nevertheless ruled that there was no constitutional impediment to depriving juveniles of this jury trial right – provided that the juvenile exchanged the jury trial for rehabilitative, parens patriae, treatment. But whether such a valid tradeoff had been made could only be answered by an examination of the conditions of the juvenile's detention, confinement, and rehabilitative opportunities. The Washington Supreme Court's decision prohibiting inquiry into context conflicts with *McKeiver*'s inquiry into the real world consequences of detention, confinement, and purported rehabilitation services, to determine whether constitutional due process rights are violated. *McKeiver*, 403 U.S. 528, 539-40, 542 (examining goals, "idealistic hopes," operation, failure and "reality" of rehabilitative ideal in determining whether denial of jury trial in juvenile justice system violated due process).

In fact, courts have consistently held that the actual conditions of civil commitment confinement – not just a formal linguistic analysis of the statute – is relevant to whether that confinement is punitive for due process purposes. "The groundbreaking case in this area is *Rouse v. Cameron*, . . . 373 F.2d 451 (1966), which held that civil commitment of a criminally insane person, without treatment, would raise 'serious' constitutional problems." *Johnson v. Solomon*, 484 F. Supp. 278, 299 (D. Md. 1979) (quoting *Rouse v. Cameron*). That "groundbreaking" case continued: "*Absent treatment, the hospital is 'transform[ed] . . . into a penitentiary* where one could be held indefinitely for no convicted offense. . . . ' " *Id.* (quoting *Rouse*, 373 F.2d at 452-53). The factor distinguishing

"civil" rehabilitative commitment from penal incarceration is the presence or absence of treatment.[5] In fact, civil commitment without treatment might be considered more than just punishment: "Indefinite commitment without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual punishment.' " *Donaldson v. O'Connor*, 493 F.2d 507, 520. Thus, the actual conditions of confinement – in particular, the presence or absence of treatment – have always been relevant to whether the due process rights of the civilly committed are violated. The Washington Supreme Court's decision eschewing inquiry into context to determine whether there was a substantive due process violation here conflicts with this line of due process decisions.

This Court has even held that real world application – not just a formal linguistic analysis – determines whether the double jeopardy clause is violated where, as

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[5] *See Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974) (affirming judgment against physicians of former patient who had been involuntarily committed; noting that absent treatment, the constitutionality of mandatory commitment would be called into question), *vacated on other grounds*, 422 U.S. 563 (1975); *United States v. Moore*, 486 F.2d 1139, 1245 (D.C. Cir. 1971), *cert. denied*, 414 U.S. 980 (1973). *Accord Lynch v. Baxley*, 744 F.2d 1452, 1462-63 (11th Cir. 1984) (use of jails for purposes of detaining persons awaiting involuntary civil commitment proceedings violated their substantive and procedural due process rights; court must look to "the particular restrictions and conditions" of the confinement to determine whether they constitute punishment; "If a restriction is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court may infer that the purpose of the government action is punishment.").

here, that question arises in the course of a double jeopardy challenge to a conviction, not a separate civil rights suit. In *Breed v. Jones*, 421 U.S. 519 (1975), this Court ruled that charging the accused as a criminal defendant in the adult court system following an adjudicatory finding in the Juvenile Court that he had committed a crime but was unfit for treatment as a juvenile, violated the double jeopardy clause. This is an important holding, given the fact that juvenile adjudications – like Washington's sexual predator adjudications – are characterized as "civil" for most purposes. Despite that civil label, this Court looked at the actual process of the juvenile adjudication and determined that it was sufficiently trial-like to constitute former jeopardy. Thus, the manner in which the juvenile justice system worked, despite its civil label, was relevant – indeed, critical and outcome-determinative – to whether a subsequent case based on the same occurrence constituted a double jeopardy violation. The Washington Supreme Court's decision prohibiting inquiry into context conflicts with this decision of this Court arising in the very double jeopardy situation presented by Mr. Turay's case.

This Court holds that the application of statutes in the real world – not just a formal linguistic analysis of the statute – is relevant to other constitutional claims, also. This Court has held that the application of a sanction is critical to determining whether that sanction violates the Eighth Amendment. *Austin v. United States*, 509 U.S. 602 (1993). This Court has held that the impact of schools separated by race in the real world – not a formal linguistic

analysis of a "separate but equal" law – determines whether "separate but equal" violates the constitutional guarantee of equal protection, despite its apparent facial neutrality. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). This Court has held that the application of a particular compulsion might be either punitive or non-punitive for double jeopardy purposes, depending on the context, in contempt cases. *Yates v. United States*, 355 U.S. 66 (1957). The Washington Supreme Court's decision prohibiting inquiry into context conflicts in principle with these decisions holding that the application of a law is relevant to determining its constitutionality.

The Washington Supreme Court's decision that a constitutional challenge to a statute must always be evaluated from a formal, linguistic, ivory tower, and cannot be contextualized by learning about the effect of that statute in the real world, conflicts with all of these due process, double jeopardy, equal protection, excessive fines, ex post facto and civil commitment cases of this Court and of the lower courts. Its holding amounts to an endorsement of the state's argument that administrative agencies are separate from the rest of the state, and that their actions are unattributable to the state in determining whether a particular state practice violates constitutional protections – though controlling precedent of this Court treats all agencies of the state as unitary for such purposes.[6] It therefore warrants review.

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[6] *E.g., Kyles v. Whitley*, 514 U.S. 419 (1995) (failure to disclose exculpatory information warrants reversal, regardless of which agency discovered, and maintained, this information).

The Washington Supreme Court's fallback stab at calling SCC's conditions non-punitive is a legal conclusion, not a factual finding; hence, it does not preclude review. The Washington Supreme Court acknowledged that in *Turay v. Weston*, No. C91-664 WD, the federal court entered an order based on a jury verdict conclusively determining that the conditions of confinement were constitutionally inadequate as to Richard Turay. App.50. That court ruled that that finding "is irrelevant to our holding here because Turay's remedy for these unconstitutional conditions is not a release from confinement," but a civil rights suit in federal court by which the state should relinquish its sovereign power and be held under a continuing injunction! *Id.* Ignoring the voluminous record concerning conditions that was presented in the trial court, and the trial court's own findings about prison-like conditions and lack of necessary treatment, the Washington Supreme Court continued that Mr. Turay failed to carry his burden of proving that his confinement was punitive for two reasons: (1) "the trial court expressly held that SCC's failure to provide Turay, in some respects, with constitutionally adequate treatment did not render RCW 71.09 punitive as applied," and (2) the federal district court noted that progress is being made at SCC and "has also refused to find that the conditions at the SCC mandate Turay's release." App.52.

The Washington Supreme Court's rulings on these issues are not findings of fact, because they ignore the factual record and the trial court factual findings, and cite only the lower court's conclusion of law. Further, its rulings on these points are erroneous. That court mistakes the district court's failure to order Mr. Turay's release in a

§ 1983 proceeding for a finding that conditions at SCC are constitutional, when this Court has held that release from confinement is unavailable in a § 1983 suit.[7] It misconstrues which sovereign has the responsibility for insuring the constitutional operation of its prisons or sexual predator confinement centers by saying that state prisoners must look to federal courts to place state institutions under injunction or to obtain damages[8] when they are deprived of constitutional rights by their incarceration. It even misstates the holdings of the federal district court on whether the conditions at SCC remain unconstitutional or not.[9] As a legal ruling on a point of federal law, rather than a properly supported factual conclusion, it is not binding on this Court. The Washington Supreme Court's decision that conditions of confinement are irrelevant should still be reviewed.

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[7] *Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

[8] App.50 ("the federal court is maintaining a zealous watch over the conditions at SCC to enforce the injunction that it put in place. Accordingly, Turay has an adequate remedy that will guarantee that the conditions at the SCC will meet or exceed constitutional standards."); *id.* App.53 ("Turay's remedy for the unconstitutional conditions is a § 1983 suit or an injunction action, such as he has already instituted.").

[9] All orders of the federal district court, since entry of the injunction, have concluded that constitutional minimum requirements have not yet been met. This is confirmed most forcefully by that Court's November 15, 1999, Order holding the state in contempt. Appendix I, App.129.

III. THE COURT'S DECISION UPHOLDING EXCLUSION OF EVIDENCE THAT A FEDERAL COURT RULED THAT THE CONDITIONS OF CONFINEMENT AT SCC WERE PUNITIVE CONFLICTS WITH THIS COURT'S PRECEDENT ON THE RIGHT TO PRESENT A DEFENSE

The state moved, in limine, to exclude evidence concerning the conditions of confinement at SCC and to exclude evidence of the verdict in *Turay v. Weston*. 9/20/94 TR:34-39; 9/20/94 TR:94. Defense counsel objected several times, explaining why this evidence was relevant: "By the State proposing SCC as an appropriate constitutionally adequate treatment center for Mr. Turay opens the door to us being able to rebut that. A jury is making a decision not just about level of confinement, but about the treatment, about less restrictive alternative treatment at SCC, and that necessarily requires information about the nature of the treatment, the lack of treatment." 9/21/94 TR:22-23.[10]

Notwithstanding the fact that a federal jury in *Turay v. Weston* had just decided that the treatment conditions at SCC were constitutionally *inadequate* for Mr. Turay, the trial judge in this state case ruled, "I think that whether or not he is receiving the appropriate type of treatment is really an unmanageable type of decision for a jury facing

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[10] The defense also explained in detail, several times, the evidence it proposed to present and the total amount of time – approximately two days – it would take. 9/27/94 TR:13 (proffering testimony of SCC superintendent Mr. Weston and program director Mr. Dehmer, psychiatric security attendants Dawn Jones and Robert Burbard, one inmate and two physicians on this point).

the questions that this jury is going to have to face." 9/21/94 TR:16-17. It excluded evidence of the verdict in his federal trial. 9/21/94 TR:18.[11] In fact, the trial court sustained an objection to defense counsel's questioning of Dr. Dreiblatt that would have elicited the basic, foundational, fact of whether Mr. Turay would be sent to SCC if the jury rejected other alternatives to that total confinement. 9/28/94 TR:169. The trial court sustained objections to questions of the superintendent of SCC about what kinds of staff misconduct had occurred at SCC. 10/5/94 TR:47, 49.

Then on direct examination, Dr. Dreiblatt was permitted to testify that among the grounds for his diagnoses of Mr. Turay was the fact that Richard threatened to sue people at SCC over the conditions of confinement. *See* 9/29/94 TR:70. Defense counsel naturally asked whether the doctor's opinion would change if it turned out Richard's law suits were meritorious, and the doctor acknowledged that bringing meritorious claims in the proper forum is not indicative of a mental problem. 9/29/94

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[11] The trial court then, apparently, had some misgivings, given the relevance and probative nature of the proffered evidence. It later stated: "The issue is whether or not a less restrictive alternative, one, is in the best interest of the respondent or of others. As to whether or not it is in the interest of the respondent, specifically, I think he is entitled to address that issue. And in order to address that issue I think some evidence with regard to the treatment is appropriate." 9/27/94 TR:28. Nevertheless, the trial court continued to exclude the most probative evidence on this point, that is, the testimony proffered by defense counsel, quoted above, and the federal jury verdict. 9/27/94 TR:30 (excluding verdict); 9/27/94 TR:31 (excluding other proffered testimony); 9/27/94 TR:32 (same).

TR:71-72. Due to the trial court's exclusion of evidence of the verdict in *Turay v. Weston*, however, defense counsel could not introduce the now critically relevant and probative evidence that Richard sued, and *prevailed*. 9/29/94 TR:72. *See also* 9/29/94 TR:126-27. The trial court continued to exclude the evidence of the federal court's finding. 9/29/94 TR:125-26; 10/7/94 TR:20-22 (offer of two exhibits, order and injunction from *Turay v. Weston*, Exs. 38-39; denied). The Washington Supreme Court held that there was no error. Opinion, pp. 23-28.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (citations omitted). It is rooted in the due process right to present a defense, the Sixth Amendment right to compulsory process, and the Sixth Amendment right to confrontation. *See Washington v. Texas*, 388 U.S. 14, 19 (1966).[12] The right to present witnesses cannot be denied where the testimony is critical to the defense and directly relevant to guilt or

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[12] *Accord Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) (fundamental Sixth Amendment right to present witnesses and a defense); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilty."). *Cf. Rock v. Arkansas*, 483 U.S. 44 (1987) (state rule excluding defendant's refreshed testimony violates Sixth Amendment rights to compulsory process and to present a defense and right to due process, as well as Fifth Amendment right to testify).

innocence.[13] The right to present witnesses is especially strong where they would rebut evidence introduced by the government from which the jury might infer an element of the crime.[14] Given the relevance of the conditions of confinement at SCC, and specifically the absence of the treatment that Mr. Turay's special needs require, to the choice of total confinement or a less restrictive alternative which rested in the jury's hands; and given that the proffered evidence would have rebutted state expert testimony that SCC was the proper place for Richard to receive treatment; exclusion conflicts with this Court's decisions concerning the right to present a defense.

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[13] *Chambers v. Mississippi*, 410 U.S. 284, 302 (rejecting even hearsay testimony is improper where it "bore persuasive assurances of trustworthiness," "was critical to Chambers' defense," and "directly affect[ed] the ascertainment of guilt.").

[14] *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985) (error to prevent defendant from rebutting evidence introduced by the government from which jury might infer motive); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980) (error to exclude testimony that another man fit the description of the robber and used "bait" money to buy car).

IV. THE ANNUAL REVIEW HEARING'S ABBREVIATED NATURE AND THE ABSENCE OF APPELLATE REVIEW CONFLICT WITH THE DUE PROCESS REQUIREMENTS MANDATED BY THIS COURT IN *KANSAS V. HENDRICKS*[15]

In *Kansas v. Hendricks*, 521 U.S. 346, this Court upheld a law similar in many respects to Washington's law. This Court emphasized that it was rejecting double jeopardy, ex post facto, and related constitutional challenges because the Kansas statute was not punitive. The Court explained that the non-punitive nature of the Kansas law was shown, in part, by the fact that it provided for a recommitment hearing at yearly intervals under "the same standards as required for the initial commitment":

> [C]ommitment under the Act is only potentially indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. § 59-29a08. If Kansas seeks to continue the detention beyond that year, *a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial commitment.*

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[15] On appeal, the state moved to redesignate the portion of Mr. Turay's appeal challenging the result of his annual review as a notice of discretionary review. Mr. Turay, who sought to appeal that finding as a matter of right, opposed, pointing out that the less process he was afforded at the periodic review hearing, the less chance that it would comply with constitutional requirements. The Washington Supreme Court ruled that there is no right to appellate review of a trial court decision at the annual review hearing. App.11-14.

Kansas v. Hendricks, 521 U.S. 346, 364 (emphasis added). The Washington Supreme Court's decision to uphold detention continued by an annual review hearing that is quick, non-jury, hearsay, and, critically unappealable, conflicts with the requirement of full due process at periodic intervals mandated by this Court as necessasry for the constitutionality of such annual recommitment proceedings in *Hendricks*.

CONCLUSION

This Court should grant a writ of certiorari in this case. Alternatively, if the writ is granted in *Young v. Weston*, 176 F.3d 1196, this Court should either consolidate this case with that one or, following decision in that case, grant, vacate and remand in this case in light of the resolution of that one.

Respectfully submitted this 20th day of March, 2000.

LAW OFFICES OF
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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of RICHARD GARRETT TURAY, Appellant.	)	No. 64100-5
	)	En Banc
	)	Filed OCT 21 1999

ALEXANDER, J. – After a King County Superior Court jury found Richard Turay to be a sexually violent predator (SVP), the trial judge committed him to the Special Commitment Center (SCC) at Monroe. Turay appealed and sought direct review by this court of his commitment and the trial court's rulings on numerous of his pretrial, trial, and posttrial motions. We granted review. Turay also filed a personal restraint petition (PRP) in this court in which he raised basically the same issues that he raised on appeal, including the question of whether the conditions of his confinement and the statute under which he was committed are unconstitutional. We granted review of Turay's PRP as well as the State's cross-appeal of the trial court's ruling that the State bears the burden of proof at show cause hearings in SVP commitment trials. We hold that the commitment statute is constitutional and, therefore, affirm the order of commitment.

FACTS

In 1991, a less than unanimous King County Superior Court jury determined that Richard Turay was an SVP

within the parameters of RCW 71.09.060, and he was, therefore, committed to the SCC at Monroe. Following Turay's commitment, this court issued its decision in *In re Personal Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), in which we held that a unanimous jury verdict is necessary to support a finding that an individual is an SVP. In light of that opinion, the Court of Appeals vacated the order committing Turay, and remanded to the superior court for a new trial.

In November 1993, Turay filed a motion, in superior court, to dismiss the State's petition and for his immediate release based upon, inter alia, "the due process and equal protection clauses of the state and federal constitutions." Clerk's Papers (CP) at 330. This motion was denied. In January 1994, Turay filed an additional motion to dismiss the commitment proceeding, arguing that the court "must dismiss the [commitment] petition against [him] because the conditions of his confinement are punitive, not treatment oriented in nature." CP at 357. In September 1994, Turay filed still another motion to dismiss based on a "violation of [his] privacy right." CP at 675. The latter two motions were not ruled on before trial.

On several occasions prior to his second commitment trial, Turay engaged in colloquy with the trial court about the possibility of representing himself. On one occasion, he filed a written motion in which he requested that attorney Mark Mestel represent him at his upcoming commitment trial or that, alternatively, his then-attorney, Jennifer Shaw, continue to represent him. As a third alternative, Turay requested that the trial court allow him to act as his own counsel. The trial court ordered that Shaw continue to represent Turay.

Also prior to his new trial, Turay filed a lawsuit in the United States District Court for the Western District of Washington against several officials at the SCC.[1] In this suit, which he maintained under 42 U.S.C. § 1983, Turay alleged, as he had in state court, that the conditions of his confinement at the SCC were unconstitutional and thus violative of his civil rights as guaranteed by the United States Constitution. A federal court jury found that the officials at the SCC had violated Turay's constitutional right to access to adequate mental health treatment and awarded him $100.00 in compensatory damages. Following receipt of the verdict, the United States District Court placed the SCC under an injunction "narrowly tailored to remedy this constitutional violation."[2] CP at 477.

At Turay's second commitment trial, which took place in superior court following entry of the injunction in the federal litigation, a jury found that he was an SVP and that "the best interests of [Turay] or others will not be served by less restrictive treatment which is an alternative to total confinement." CP at 844. Accordingly, on October 19, 1994, the trial court entered an order committing Turay as an SVP. Nine days later, Turay filed a

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[1] *Turay v. Weston*, No. C91-664WD (W.D. Wash. 1994)

[2] On November 25, 1998, the federal court entered an order continuing the injunction because it found that the conditions of confinement remained, in part, unconstitutional. The federal court noted, however, that the "defendants were making good faith efforts to achieve compliance . . . [and that a] tremendous amount of work has been invested by the parties, counsel, special master, and the court to accomplish an inherently difficult task." Third Statement of Supplemental Authorities, app. A at 4.

motion that he denominated as a "Motion for New Trial and for Extension of Time." CP at 847.

In April 1995, in response to Turay's September 1994 pretrial motion to dismiss, the trial court entered "Findings of Fact and Conclusions of Law and [an] Order" in which it concluded that certain aspects of the SCC's treatment program violated Turay's substantive due process rights. CP at 848-63. It, therefore, ordered the SCC to remedy those deficiencies in its treatment program and "to report to the Court within 30 days . . . as to the status of the conditions found to be in violation of [Turay's] constitutional rights." CP at 863. On December 8, 1995, a show cause hearing was held, pursuant to RCW 71.09.090(2), to determine "whether facts exist that warrant a hearing on whether Richard Turay's condition has so changed that he is safe to be conditionally released to a less restrictive alternative or unconditionally discharged." CP at 5. The trial court determined at that hearing that sufficient facts were not presented to warrant a further hearing, and it ordered that Turay continue in detention.

One week later, Turay filed a motion for an order to dismiss and to vacate his detention, arguing that his confinement at the SCC amounted to "punishment," and thus "violate[d] the double jeopardy clause." CP at 948. He also filed a "Motion for Reconsideration of RCW 71.09.090 Continuing Detention Decision," alleging that "RCW 71.09's yearly review provisions" violated the Equal Protection and Due Process clauses of the Washington State and United States Constitutions. CP at 1050, 1052, 1068.

On May 9, 1996, the trial court entered an order in response to Turay's motions to dismiss and for reconsideration. It upheld the constitutionality of RCW 71.09.090 and denied Turay's request for immediate release. It did, however, conclude that RCW 71.09.090 violated equal protection by failing to grant an SVP a mandatory review hearing at intervals of 180 days as is the case with mentally ill persons under RCW 71.05.[3] The remedy imposed by the trial court was simply to require review hearings for SVPs every 180 days as opposed to annually as provided by RCW 71.09.090. In addition, the court concluded that the State bears the burden of proof at show cause hearings held pursuant to RCW 71.09.090(2), at which the court determines whether there is probable cause to believe that the SVP's "mental abnormality or personality disorder has so changed that [he or she] is not likely to engage in predatory acts of sexual violence if conditionally released." CP at 1156-157.

On May 22, 1996, Turay appealed and sought direct review by this court of the trial court's order committing him as an SVP, and its rulings on "all pretrial, trial, and post-trial motions." CP at 1164. The State cross-appealed the trial court's ruling placing the burden of proof on it at show cause hearings held pursuant to RCW 71.09.090(2). Shortly thereafter, Turay filed a PRP in this court in which he raised basically the same issues that he raised on

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[3] RCW 71.05 governs the involuntary civil commitment of individuals who suffer from a serious mental disorder, and as a result of that disorder, pose a significant danger to themselves or others.

direct appeal. We granted review of the direct appeal and the PRP, and consolidated the two cases.

Because the State raised a question as to the timeliness of Turay's direct appeal, he filed a motion to enlarge time to file notice of appeal. The State subsequently filed a motion to redesignate the portion of Turay's notice of appeal relating to the trial court's May 9, 1996 order into a "notice for discretionary review." Mot. to Redesignate at 2. These motions were passed to the merits.

We also requested that the parties advise us in writing of any new developments regarding the conditions at the SCC. After both parties filed their responses to this request, the State filed a motion to strike a portion of Turay's response, claiming that Turay attempted to improperly supplement the appellate record in violation of RAP 9.1 and 9.11. This motion was also passed to the merits.

I. PROCEDURAL ISSUES

A. Timely Notice of Appeal

The State claims that Turay's appeal of his 1994 commitment order was not timely and should, therefore, be dismissed. Pursuant to RAP 5.2(a), Turay had 30 days from the date the commitment order was entered within which to file his notice of appeal. Although Turay did not file his "notice of appeal" until May 22, 1996, which was far more than 30 days after the date the commitment order was entered, he did file his motion for new trial and for extension of time within 10 days of the entry of

the commitment order.[4] Turay contends that because the trial court failed to rule on this motion, the time for filing his appeal was tolled pursuant to RAP 5.2(e) until the trial court issued its May 9, 1996 order denying his release from confinement, an order which he concedes "decided [his] outstanding motion for [a] new trial."[5] Appellant's Opening Br. at 69.

The State counters Turay's argument by asserting that the motion, which Turay filed on October 28, 1994, was not, notwithstanding its title, a motion for a new trial and, thus, did not toll the period within which to file a notice of appeal. Turay's motion, in relevant part, stated:

> [R]espondent . . . moves the court for an order for a new trial. Respondent additionally seeks an order granting a thirty day extension of time in which to identify the specific reasons in law and fact as to the grounds for his motion. This motion is based on CR 59, the files and records herein, and the attached affidavit of Karen P. O'Shea.

CP at 847. This motion was supported by an affidavit by Turay's attorney, in which she stated:

> 1. I am one of the attorneys for respondent Richard Turay.

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[4] CR 59(b) provides that a motion for a new trial must be filed within 10 days after entry of the judgment. Accordingly, Turay filed this motion in a timely manner.

[5] RAP 5.2(e), in relevant part, provides that a "notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within . . . 30 days after the entry of the order."

> 2. My law firm substituted as counsel for respondent on October 19, 1994.
>
> 3. I have met with Mr. Turay's previous counsel and have been provided with their file materials.
>
> 4. The file in this case is voluminous and the issues are complex. I will be unable to review and digest all of the relevant materials within ten days after the entry of the Order of Commitment.
>
> 5. In order to adequately represent the interests of respondent, an additional thirty days from the date of this motion is requested in which to state the grounds for a new trial.

CP at 3.

Even viewing the motion and its supporting affidavit in a light favorable to Turay, it cannot be said that he meticulously complied with the procedural requirements for a motion for a new trial that are found in CR 59(b) and King County LR 7.[6] Indeed, Turay's counsel concedes that his motion was "slim." Appellant's Opening Br. at 69. He contends, however, that it was legally sufficient

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[6] CR 59(b), in relevant part, provides that "[a] motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based." King County LR 7(b)(4)(B) elaborates on this requirement and mandates that a motion for a new trial must state the relief requested, the issues, the evidence relied upon, and any legal authority relied upon. In addition, Turay failed to attach a proposed order when he filed the motion for a new trial, despite the fact that LR 7(b)(4)(C) mandates that "[t]he moving party and any party opposing the motion shall attach to their papers a proposed order."

because "nothing in the rules differentiates between well prepared and poorly prepared motions." Appellant's Opening Br. at 69.

When this court made major revisions to the rules of civil procedure in 1967, it had as a goal the elimination of "many procedural traps now existing in Washington practice' " [sic] and minimization of "technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice.' " *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 766, 767, 522 P.2d 822 (1974) (quoting in part Forward to Civil Rules for Superior Court, 71 Wn.2d xxiii, xxiv (1967)). In keeping with this mandate, Washington's appellate courts have strived to elevate substance over form, and decide cases on their merits. *See Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992) (holding "that the civil rules contain a preference for deciding cases on their merits rather than on procedural technicalities"); *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 895, 639 P.2d 732 (1982) (stating the "present rules were designed to allow some flexibility in order to avoid harsh results"); *First Fed. Sav. & Loan Assoc. v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980) (holding that "whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form"). Furthermore, in *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980), we held that substantial compliance with procedural rules is sufficient because " 'delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities.' " (alteration in original) (quoting *Curtis Lumber*, 83 Wn.2d at 767).

After viewing Turay's October 28, 1994 motion and supporting affidavit with the aforementioned principles in mind, we are satisfied that the submissions satisfy the spirit, if not the letter, of the requirements set forth in CR 59 and King County LR 7. Significantly, the motion sets forth the relief that Turay requests. Although it is a bit of a stretch to say that the motion and affidavit set forth "the specific reasons in fact and law as to each ground on which the motion [was] based," we believe we can be generous in reviewing Turay's submissions because, as a practical matter, he has raised the same issues in his PRP.[7] CR 59(b).

As an alternative argument, the State asserts that Turay's notice of appeal of May 22, 1996 was not timely because the trial court decided "any remaining pretrial motions" in the April 4, 1995 order, wherein it entered findings of fact and conclusions of law and an order in regard to Turay's September 1994 motion to dismiss. Br. of Resp't and Cross-Appellant at 18-19. This argument fails because the April 1995 order did not purport to decide Turay's motion for a new trial. Rather, it dealt strictly with his pretrial motion to dismiss.

Additionally, the State claims that, regardless of the procedural sufficiency of Turay's motion for a new trial, it did not toll the appeals period because Turay failed to "note" the motion for hearing. Br. of Resp't and Cross-Appellant at 13, 14. This contention also lacks merit because the "failure to note the motion at the time it is

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[7] In addition, this allows us to reach the issue the State raises in its cross-appeal.

served and filed does not affect the extension of time for appeal under RAP 5.2(e)." *Buckner, Inc. v. Berkey Irrigation Supply*, 89 Wn. App. 906, 916, 951 P.2d 338, *review denied*, 136 Wn.2d 1020, 969 P.2d 1063 (1998).

In short, we are satisfied that Turay's October 28, 1994 motion may be treated as a valid motion for a new trial. It, therefore, tolled the time for filing an appeal until May 9, 1996, the date when the motion was effectively denied. Consequently, Turay's May 22, 1996 notice of appeal was timely filed.

B. State's Motion to Redesignate a Portion of Turay's Appeal as a Notice for Discretionary Review

As noted above, the State moved this court for an order "redesignating [the] portion of . . . Turay's notice of appeal seeking review of the [May 9, 1996] post-commitment order to a notice for discretionary review." Mot. to Redesignate at 1. It also contends that this request for "[d]iscretionary review should . . . be denied under RAP 2.3(b)." Br. of Resp't and Cross-Appellant at 23.

RAP 2.2(a) sets forth the grounds on which a party may appeal a decision of the superior court as a matter of right. The State contends that postcommitment orders in SVP cases do not fall under any of the grounds covered by RAP 2.2(a) and, thus, "review can only be sought through a timely notice of discretionary review." Mot. to Redesignate at 4.

The only subsection of RAP 2.2(a) arguably applicable to the postcommitment order at issue is RAP 2.2(a)(1),

which provides that a party may appeal from a "*final judgment* entered in any action or proceeding." (Emphasis added.) However, a "final judgment" is one that settles all the issues in a case. *See Rhodes v. D&D Enters., Inc.*, 16 Wn. App. 175, 178, 554 P.2d 390 (1976); *see also* CR 54(a)(1) (providing that a "judgment is the final determination of the rights of the parties in the action"). Pursuant to RCW 71.09.090(3), the superior court has continuing jurisdiction over a civilly committed individual until he or she is unconditionally discharged. In our judgment, the post-commitment order was not a "final judgment" because it did not constitute a final determination of Turay's rights, nor did it settle all of the issues in the case. *Cf. In re Detention of Petersen*, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999) ("A decision under RCW 71.09.090(2) finding no probable cause is not a final order after judgment in light of the court's continuing jurisdiction over the committed persons until their unconditional release."). Because the May 9, 1996 order was not a "final judgment," we grant the State's motion to designate the portion of Turay's appeal seeking review of that order as a "notice for discretionary review."[8]

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[8] The dissent asserts that our holding "diminishes [Turay's] access to whatever justice may be provided through appellate review." Dissenting op. at 1. The dissent goes on to contend that Turay may appeal the trial court's May 9, 1996 Order Denying Motions for Reconsideration and to Dismiss as of right pursuant to RAP 2.2(a)(10), which states that orders granting or denying a motion to vacate a judgment may be appealed as of right. Dissenting op. at 1-2. This contention ignores the fact that a person found to be an SVP is not denied access to appellate review because all SVPs may, as of right, appeal their *initial order of commitment* pursuant to RAP 2.2(a)(8). Furthermore, the

Turay, possibly in recognition of the meritorious nature of the State's motion,[9] requests that if we redesignate his notice of appeal, that we consider the brief he submitted in support of his notice of appeal "as the required substantive motion for discretionary review." Opp'n to State's Mot. to Redesignate at 15. Even considering that brief, we conclude that Turay fails to satisfy the criteria found at RAP 2.3(b) for discretionary review, and, therefore, we reject his motion for discretionary review of the postcommitment order.[10] In doing so, we note that the

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record does not support the dissent's characterization of the trial court's May 9, 1996 order. That order responded to, among other things, Turay's December 15, 1995 "Motion to Dismiss and Vacate Detention" based upon *the conditions of confinement* at the SCC. This motion was not, as the dissent asserts, a motion to vacate the judgment declaring Turay an SVP. Moreover, as we have noted above, Turay did not need to file such a motion because he was entitled to, and indeed did, appeal as a matter of right the initial decision ordering his commitment as an SVP pursuant to RAP 2.2(a)(8). Finally, our conclusion is buttressed by the fact that Turay has *never* asserted that he may appeal the trial court's May 9, 1996 postcommitment order pursuant to RAP 2.2(a)(10).

[9] Turay conceded that the State may be correct. *See* Opp'n to State's Mot. to Redesignate at 1 (stating that "the state may be correct in arguing that the proper method of seeking review of the trial court's recommitment decision is not by direct appeal").

[10] RAP 2.3(b) provides that "discretionary review will be accepted only:

"(1) If the superior court has committed an obvious error which would render further proceedings useless;

"(2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

State's victory on this issue is somewhat Pyrrhic, because Turay has raised the same issues in his appeal from the October 1994 order of commitment, that he raised in what we have now denominated as a request for discretionary review of the May 9, 1996 postcommitment order.

C. State's Motion to Dismiss Turay's Personal Restraint Petition

As noted above, Turay filed a PRP in 1997 in which he incorporated the same arguments that he set forth in his opening brief in support of his direct appeal. Turay also raised a new claim in his PRP to the effect that the trial court erred in admitting evidence of his 1977 rape conviction at his commitment trial because the conviction was unconstitutionally obtained. The State asserts that the "portions of the PRP duplicating the direct appeal should be dismissed under RAP 16.4(d) because Turay currently has an adequate remedy in his direct appeal." State's Mot. on the Merits to Dismiss Turay's PRP at 1. The State also contends that "[t]he remainder of the PRP, which challenges the 1977 rape conviction[,] is barred by RCW 10.73.090." State's Mot. on the Merits to Dismiss Turay's PRP at 1.

RAP 16.4(d) states, in relevant part, that "[t]he appellate court will only grant relief by a personal restraint

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or

"(3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court."

petition if other remedies which may be available to petitioner are inadequate." Because we have determined that Turay filed his direct appeal in a timely fashion, he has an adequate remedy for all of the claims that he sets forth in the PRP, except for his claim that admission of his 1977 rape conviction was error. Thus, we need only address the portion of the PRP dealing with that issue.

With regard to his 1977 rape conviction, Turay asserts that because SVP commitment proceedings are civil in nature, RCW 10.73.090 is inapplicable. This assertion, however, ignores the plain language of RCW 10.73.090(1), which provides that "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed *more than one year after the judgment* becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." (Emphasis added.) Because Turay is collaterally attacking his 1977 rape conviction on constitutional grounds, the statute applies. Accordingly, his failure to file a PRP within a year of this conviction bars our consideration of it. To hold otherwise would lead to the absurd result of condoning Turay's failure to challenge the conviction for over 20 years.

Turay argues that, "[e]ven if the one year statute of limitations applies to civil commitment actions like this one," the one-year period should begin from when the conviction is used against him in a subsequent proceeding. Reply Br. in Supp. of PRP at 10. The argument fails, this court having held that the one-year period in which to challenge a conviction by collateral attack runs from when the conviction becomes final, and not when the conviction is used in subsequent proceedings. *See In re*

Personal Restraint of Runyan, 121 Wn.2d 432, 450-51, 853 P.2d 424 (1993).[11]

II. SUBSTANTIVE ISSUES RAISED BY TURAY

A. Trial Court's Refusal to Allow Turay to Represent Himself

Turay claims that he "made a clear, timely, and unequivocal request to represent himself" before his second commitment trial, and that the trial court committed reversible error when it denied this request. Appellant's Opening Br. at 15. The State responds that Turay's request for self-representation was at most "equivocal," and was, therefore, properly denied. Br. of Resp't and Cross-Appellant at 27.

If Turay desired to represent himself, his request to do so must have been unequivocal in the context of the record as a whole.[12] *State v. Stenson*, 132 Wn.2d 668, 740-42, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). In addition, the United States Supreme Court requires "that courts indulge in every reasonable presumption" against a defendant's waiver of his or her right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); *see also State v. Robtoy*, 98

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[11] Because we have dismissed Turay's entire PRP, the State's motion to strike portions of the letter that Turay submitted to this court as a supplement to the PRP is moot.

[12] Further, even "when the right is unequivocally asserted . . . it may still be subsequently waived by words or conduct." *State v. Fritz*, 21 Wn. App. 354, 360, 585 P.2d 173, 98 A.L.R.3D 1 (1978), *review denied*, 92 Wn.2d 1002 (1979).

Wn.2d 30, 40, 653 P.2d 284 (1982). Accordingly, in determining whether Turay's requests to represent himself were unequivocal, we must view the record as a whole, keeping in mind the presumption against the effective waiver of right to counsel.

At a pretrial hearing held on November 16, 1997, Turay indicated to the trial court that he was making a motion "to represent myself with standby counsel." Report of Proceedings (RP) (Nov. 16, 1993) at 13. He prefaced this comment, however, with several requests to have Mark Mestel, an attorney who had represented him at his first commitment trial, represent him again. Because Mestel was unavailable at that time, the trial judge asked Turay if he would be willing to work with Jennifer Shaw, of the Public Defenders Association, until the court could determine whether Mestel would be able to represent him at some time in the future. Turay did not directly respond to the trial court's inquiries at that point. Later in the hearing, the trial court and Turay engaged in the following colloquy:

> THE COURT: Are you willing to work with Ms. Shaw to have her raise whatever motions she thinks are proper in your behalf?. . . .
>
> . . . .
>
> TURAY: . . . *I don't know.* I'd have to think it over. I can't make that decision right now.

RP (Nov. 16, 1993) at 10-11 (emphasis added). The discussion between Turay and the court continued:

> TURAY: Again, do you want me to work with her [Shaw] on the motions that I just presented, or do you want me to work with her under this – this law that was found constitutional?
>
> THE COURT: I want you to work with her at least until we find out a definite word from Mr. Mestel on every aspect of this case. . . .
>
> TURAY: *All right.*

RP (Nov. 16, 1993) at 12 (emphasis added). Finally, the discussion ended with the following exchange:

> THE COURT: [A]ll I'm asking right now is, are you willing to work with Ms. Shaw? I don't care if you call her standby counsel or anything, are you willing to work with her so that she can make the other motions she believes may have merit to this Court as we start this process?
>
> . . . .
>
> TURAY: On the motions I just presented –
>
> THE COURT: Yes.
>
> TURAY: . . . Instead of me just coming off the top of my head with an answer, can I have the Court's permission to think this over?
>
> THE COURT: Absolutely.

RP (Nov. 16, 1993) at 13-14. These exchanges illustrate that at this point Turay did not state an unequivocal desire to proceed without assistance of counsel. To the contrary, it is apparent that he wanted an attorney, Mark Mestel, to represent him. At best he was ambivalent

about whether he would accept the appointment of substitute counsel.

At a subsequent hearing that was held on December 15, 1993 the trial court again broached the subject of whether Turay desired to represent himself. In response to this inquiry, Turay's court appointed attorney, Ms. Shaw, expressly stated, "Mr. Turay and I have discussed this and *Mr. Turay does wish to have me representing him* on the pretrial motions filed and argue them today." RP (Dec. 15, 1993) at 3 (emphasis added). The following day the issue of whether Turay desired to represent himself again surfaced. At this time, Turay renewed his request to have the court appoint Mestel as his counsel. Turay went on to state that if Mestel could not represent him, he would like the court to appoint another attorney, Jim Short, as his counsel.

The trial court denied, without prejudice, Turay's request to have Mestel represent him. It did so because Mestel was unavailable. At that point, Turay made another reference to acting as his own counsel, and was asked by the trial court if he was in fact making a motion to represent himself. Turay responded, "I would like to reserve the motion I just made in representing myself for a later date." RP (Dec. 16, 1993) at 87. These statements by Turay, in our view, do not satisfy the "unequivocal" standard.

In February 1994, the trial court entered an order in response to another motion by Turay. In his motion, Turay requested that the court (1) appoint Mestel to represent him; (2) alternatively, order Shaw to remain as his counsel; and (3) as a last choice, allow him to act as his

own counsel. The trial court granted Turay's second request, and ordered that Shaw continue to represent him. Significantly, in *Stenson* this court stated that if a defendant requests to act as his own attorney as an alternative to substitution of a new counsel, this may constitute an indication to the trial court that, in light of the whole record, the request *is not unequivocal. See Stenson*, 132 Wn.2d at 740-41. Further, it is noteworthy that Turay's request to proceed without counsel was actually his third request, thereby undermining his assertion that his request was unequivocal.

The final discussion regarding whether Turay wanted to represent himself occurred at a pretrial hearing on February 25, 1994. At that hearing, Turay again stated that he wanted the court to appoint Mestel to represent him, and he objected to the fact that the court had not appointed Mestel as his counsel. The court asked Turay, "Do you feel that you and he [the appointed attorney] are going to be able to have at least a decent attorney-client relationship?" RP (Feb. 25, 1994) at 3. Turay responded, "Yes, I don't see any problem in that, but I would still like to preserve my objections." RP (Feb. 25, 1994) at 3. Once again, Turay's statements fall short of an unequivocal request to waive his right to counsel.

In sum, when we examine the record as a whole, and in light of the presumption against waiver of right to counsel, we conclude that Turay's requests to represent himself were, at best, equivocal.[13] Accordingly, the trial

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[13] As the State points out, and the discussion above illustrates, Turay requested the appointment of three different

court did not err in denying Turay's motions to represent himself.

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attorneys, agreed to cooperate with appointed counsel, and declined to have his motion to act pro se heard by the court when offered the opportunity. This scenario is analogous to *Hamilton v. Groose*, 28 F.3d 859 (8th Cir. 1994), where the Eighth Circuit Court of Appeals rejected the defendant's contention that he had been denied his Sixth Amendment right to represent himself, stating that the "equivocal way in which [the defendant] made his motion to represent himself . . . would provide the basis for a colorable Sixth Amendment claim regardless of how the trial judge had ruled." *Hamilton*, 28 F.3d at 862. The present case is comparable because Turay's request to represent himself was so equivocal that he might have had a Sixth Amendment claim if the court *had* allowed him to act pro se.

While the dissent takes issue with our holding that Turay did not make an unequivocal request to represent himself, we fail to see how, after an *objective analysis of the record as a whole*, one could arrive at this conclusion. Furthermore, we note that the dissent fails to sufficiently appreciate the strong presumption against a defendant's effective waiver of his or her right to counsel. *Brewer*, 430 U.S. at 404; *Robtoy*, 98 Wn.2d at 40. The dissenting justice contends, without citing to any authority, that "[t]he presumption against waiver of counsel is not, however, a presumption against one's substituting self-representation for retained or appointed representation. [*Brewer* and *Robtoy*] involved the waiver of the right to counsel during a *custodial interrogation* – not an election of self-representation at trial." Dissenting op. at 3 n.1. This analysis is wholly circular. If the presumption against waiver of counsel is not a presumption against self-representation, exactly what is it a presumption against? A presumption against waiver of counsel is by definition a presumption against self-representation because if one were to waive their right to counsel they would necessarily be acting pro se. In addition, contrary to the dissent's assertions, neither *Brewer* nor *Robtoy* were confined to circumstances involving the right to counsel during a custodial interrogation.

B. Admission of Testimony Regarding Turay's Prior Rape Convictions

At his second commitment trial, Turay made several motions to exclude the testimony of several of his prior rape victims, expert testimony, and other evidence relating to these prior rapes.[14] Although Turay offered to stipulate to the existence of his prior rape convictions, in order to prevent "prejudicing the jury by garnering overwhelming sympathy for [the victims,]" the State would not agree to enter into such a stipulation.[15] RP (Sept. 21, 1994) at 153. The trial court "exclude[d] any reference to non sex offenses except those that can be specifically tied, connected to [Turay's] sexual history," however, it admitted most of the evidence which Turay sought to exclude.[16] RP (Sept. 21, 1994) at 31. Turay asserts that the

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See, e.g., Brewer, 430 U.S. at 404 (stating that the presumption against waiver of right to counsel "applies equally to an alleged waiver of the right to counsel *whether at trial or at a critical stage of pretrial proceedings.*") (emphasis added) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 238-40, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)); *Robtoy,* 98 Wn.2d at 40 (citing *Brewer,* 430 U.S. at 404).

[14] The record indicates that Turay has three prior rape convictions.

[15] Evidence of a prior conviction for a crime of sexual violence is relevant because a sexually violent predator is defined as: "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(1).

[16] Significantly, the trial court gave a limiting instruction that the jurors were not to consider the description in a physician's (an expert witness) testimony of Turay's prior rapes

trial court erred in admitting this evidence because it was unfairly prejudicial under ER 403.

Turay concedes that in *Young* this court "upheld the practice of admitting testimony from prior victims of the respondent's sex crimes – rather than admitting only the fact of the Judgment – in sexual predator trials." Appellant's Opening Br. at 58. He attempts to circumvent *Young* by relying solely upon the United States Supreme Court's recent decision in *Old Chief v. United States*, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), wherein the court held:

> The issue here is whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.

Turay's reliance upon this case is misplaced for several reasons. First, *Old Chief* is not entirely on point because the State's purpose for introducing prior victim testimony in SVP proceedings is not "solely" to prove the existence of a prior conviction. *Old Chief*, 519 U.S. at 174. The purpose of SVP commitment proceedings, pursuant to RCW 71.09.060(1), is for "[t]he court or jury [to] determine whether, beyond a reasonable doubt, the person is a sexually violent predator." In making this determination,

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"for the truth of the matter asserted but only for the purpose of assessing what weight should be given the expert witness's testimony." RP (Oct. 7, 1994) at 26.

the manner in which the alleged SVP committed his or her previous crimes is relevant to establish the "motivations and mental states" of that person. *Young*, 122 Wn.2d at 53. Furthermore, the prejudicial effect of introducing testimony of prior victims does not outweigh its probative value because "[i]n assessing whether an individual is a sexually violent predator, prior sexual history is *highly probative* of his or her propensity for future violence" and "the likelihood of continued violence on the part of petitioners is central to the determination of whether they are sexually violent predators under the terms of the Statute." *Young*, 122 Wn.2d at 53 (emphasis added). Accordingly, the rationale behind admitting prior victim testimony in an SVP commitment proceeding is not solely to prove the element of prior conviction, but rather to assess the mental state of the alleged SVP, the nature of his or her sexual deviancy, and the likelihood that he or she will commit a crime involving sexual violence in the future.

In addition, the other prong in the test set forth in *Old Chief* is not met here. The Supreme Court stated there that the improper ground at issue was the possibility of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged." *Old Chief*, 519 U.S. at 180. As we stated above, this simply is not the purpose of an SVP commitment proceeding because the trier of fact is not attempting to determine whether the alleged SVP committed the "bad act now charged," but is rather trying to determine whether the person suffers from a mental abnormality or personality disorder which makes them

likely to engage in predatory acts of sexual violence if not confined in a secure facility. *See* RCW 71.09.020(1).

The final reason why Turay's reliance upon *Old Chief* is erroneous is that in that case the Supreme Court stated its "holding is limited to cases involving proof of felon status." *Old Chief*, 519 U.S. at 183 n.7. SVP commitment proceedings, as previously noted, do not revolve around "proof of felon status," but rather turn upon the determination of whether a particular person fits within the definition of an SVP. *See* RCW 71.09.060(1).

Finally, even assuming arguendo that *Old Chief* is applicable to SVP commitment proceedings, this court is not bound by that decision because "federal case law interpreting a federal rule is not binding on this court even where the rule is identical '[t]his court is the final authority insofar as interpretations of this State's rules is concerned.' " *State v. Copeland*, 130 Wn.2d 244, 258-59, 922 P.2d 1304 (1996) (alteration in original) (quoting *State v. Brown*, 113 Wn.2d 520, 548, 782 P.2d 1013, 787 P.2d 906, 80 A.L.R.4TH 989 (1989)); *see also Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984). Accordingly, *Old Chief's* interpretation of FED. R. EVID. 403 does not bind this court in our interpretation of ER 403. For the aforementioned reasons, the trial court did not err in its admission of the evidence relating to Turay's prior rape victims.

C. Exclusion at Trial of Evidence of the Conditions of Confinement at the SCC and of Evidence of the Verdict in Turay's Federal Litigation

Turay contends that the trial court committed reversible error by granting the State's motion in limine to

exclude evidence of the conditions of confinement at the SCC and of the verdict in Turay's federal litigation[17]

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[17] Prior to Turay's commitment trial, the State made a motion in limine to exclude evidence of: (1) the conditions of confinement at the SCC; (2) whether there were less restrictive alternatives to Turay's total confinement; and (3) the verdict in Turay's federal litigation. The State argued that this evidence was not relevant to the jury's determination of whether Turay was an SVP because the focus in the commitment trial should be on Turay and whether he would be amenable to treatment in a less secure setting. The trial court partially granted the State's motion stating: "the issue for the jury is, whether or not the respondent [Turay] should be confined to a secure setting, or is there something less secure that would be in the best interest of the respondent or others. The issues regarding the type of treatment that is available are not really relevant to that consideration. I think that whether or not he is receiving the appropriate type of treatment is really an unmanageable type of decision for a jury facing the questions that this jury is going to have to face. It seems to me that if the jury determines that the respondent is a sexually violent predator, that there are no less restrictive alternatives available, then it's the Court's duty to insure that treatment occurs in that environment. Similarly, if the jury were to determine that less restrictive alternatives were appropriate, it would be the Court's duty to insure that treatment did occur in that setting. And the Court, with the assistance of the parties, would fashion such an environment for that treatment to take place. For those reasons I am going to grant the State's motion to exclude any reference to the conditions of confinement at the SCC." RP (Sept. 21, 1994) at 16-17.

The trial court also excluded evidence of the jury's verdict in Turay's federal case as irrelevant to the issues before the jury in his commitment trial. However, the court denied the State's motion to exclude evidence of whether there were less restrictive alternatives to Turay's total confinement, stating "it is the respondent's right to challenge whether or not the State has met its burden of proving that no less restrictive alternatives

because this evidence was "relevant and powerful" and the "exclusion of powerful exculpatory evidence proffered by the defense violates the right to due process and to present a defense." Appellant's Opening Br. at 63, 64. The State counters that this evidence was properly excluded and that "Turay's argument depends on a misconstruction of the trial issues." Br. of Resp't and Cross-Appellant at 73.

Turay's arguments in regard to this issue are meritless and demonstrate a fundamental misunderstanding of the purpose of an SVP commitment proceeding.[18] The trier of fact's role in an SVP commitment proceeding, as the trial judge correctly noted, is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement. *See* RCW 71.09.060(1) (stating "[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. . . . If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services [DSHS] for placement in a secure facility operated by the department of social and health services"). The particular DSHS facility to which a defendant will be committed should have no bearing on

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are appropriate. . . . So the motion to exclude that type of evidence would be denied." RP (Sept. 21, 1994) at 17-18.

[18] In addition, he ignores the principle that "[t]he determination of relevance is within the broad discretion of the trial court, and will not be disturbed *absent manifest abuse of that discretion.*" *Young*, 122 Wn.2d at 53 (emphasis added) (citing *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990)); *see Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979).

whether that person falls within RCW 71.090.020(1)'s definition of an SVP. Furthermore, a person committed under RCW 71.09 may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09. *In re Detention McClatchey*, 133 Wn.2d 1, 5, 940 P.2d 646 (1997). As a result, the conditions at a particular DSHS facility, as well as the verdict in Turay's federal litigation, are irrelevant to the determination of whether a person fits within the statutory definition of an SVP and, therefore, the trial court properly granted the State's motion to exclude this evidence.

Turay also contends that he should have been able to introduce evidence regarding the conditions of confinement because the trial court permitted the State's expert, Dr. Dreiblatt, to testify on direct examination that "among the grounds for his diagnoses of Richard [Turay] was the fact that Richard *threatened to sue* people at SCC over the conditions of confinement." Appellant's Opening Br. at 62. Turay takes Dr. Dreiblatt's testimony out of context in an attempt to buttress his argument.[19] Dr.

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[19] The following summary gives a more accurate representation of Dr. Dreiblatt's testimony. On direct examination, the following exchange occurred between the prosecuting attorney and Dr. Dreiblatt:

"Q: Doctor, when you left off you were talking about Mr. Turay's dementia. And we had discussed briefly personality trait disturbances associated with dementia. What I would like you to do now is, describe the personality trait disturbances associated with the dementia that you found in Mr. Turay.

Dreiblatt's testimony, when viewed in context, reveals that his diagnosis of Turay was not influenced by Turay's

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"A: In Mr. Turay I found that there had been a consistent and enduring pattern of mal adaptive and inflexible behavior that kind of pervades his life. . . . The specific features that I see in terms of that mal adaptive personality involves what we call antisocial features, things such as failure to conform to social norms, deceitfulness and dishonesty, impulsivity, failure to plan ahead, irritability and aggressiveness. Disregard for the safety of others, lack of remorse about a behavior, low frustration tolerance, poor judgment. . . . I have also come to believe that there are also some, what we consider narcissistic features where a person has an exaggerated sense of their self-importance, a feeling of entitlement or exploitiveness. . . .

"Q: Doctor, you talk about the narcissistic features, giving him an exaggerated sense of self importance. Can you give us an example of what you are talking about in Mr. Turay?

"A: An example would be, I consider some of Mr. Turay's behavior at the Special Commitment Center where basically he makes threats to people, he threatens them with powers that he believes he has, threats to sue, threats to harm, things of that [sic], involves a belief, I believe, that he has an exaggerated sense of self-importance, that he is a very important person, he can do all that." RP (Sept. 28, 1994) at 108-10.

On cross-examination, the following exchange occurred between Dr. Dreiblatt and the defense counsel:

"Q: Doctor, you told the jury yesterday that you think Mr. Turay has narcissistic personality traits?

"A: Some narcissistic personality traits.

"Q: And one piece of evidence, in your mind, that he has narcissistic personality traits is, that he has threatened to sue people at the Special Commitment Center; isn't that correct?

"A: I commented that one of the things is, quality of superiority that in some ways had to do with threats to sue.

decision to sue the SCC and some of its staff members. Rather, Dr. Dreiblatt determined that Turay's threats fell

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"Q: Please explain why threats to sue suggests to you a narcissistic personality trait?

"A: There are various ways someone could threaten to sue. In the notes I was looking at it was used in terms of specific situations where, basically my sense was that Mr. Turay was saying, well, I'm in control, I am in charge, don't cross me, because I can do any one of a number of things. And sue was only one of a variety of threats he made. *I mentioned several different kinds of threats,* if you fool with me, and I am paraphrasing, I will get you, I will get you later, the kind of notion I am a powerful person, who, if you mess with me, I am going to take care of you, I am going to fix you. *It wasn't specifically threats to sue,* which is one of a family of different kinds of threats that were conveying I am an important person, I am in charge, I can control you people. *It wasn't specifically that statement, it was the group of things that were going on.*

"Q: What if Mr. Turay's claim was meritorious?

"A: I think the issue of whether one has a cause for suit when one is threatening people to get their own way with threats are two separate issues.

"Q: What if Mr. Turay's threat of suit is based on a real claim, based on a real violation, does that make him narcissistic?

"A: I would say that if Mr. Turay is in a prison-like environment and going around and telling people you can't do this, you can't do that, I will harm you, I will beat you up, *I will do sexual things to you,* that in no way has to do with the credit of a suit. If he has issues that he has rightfully somehow been harmed, that he is going to sue, that is a whole different issue that I am not involved with. . . . *What I considered narcissistic is, holding over the staff, if you don't do what I want I am going to either harm you or sue or get you, and I felt that that expressed a belief in his importance and specialness that fit that qualification.*" RP (Sept. 29, 1994) at 70-72 (emphasis added).

This testimony belies the dissent's claim that Turay was "penaliz[ed] . . . for pursuing his legal remedies." Dissenting op.

under an umbrella of a larger group of threats that Turay consistently made which manifested his dangerousness as an SVP. The introduction of testimony regarding an alleged SVP's mental abnormality and/or personality disorder is not only appropriate, but it constitutes the very purpose of an SVP commitment proceeding. *See* RCW 71.09.020(1); RCW 71.09.060(1). Accordingly, we affirm the trial court's granting of the State's motion to exclude evidence regarding the conditions of confinement at the SCC and the jury's verdict in Turay's federal case.

D. Trial Court's Instructions

Turay claims that the trial court's jury instructions erroneously reduced the State's burden of proof from "beyond a reasonable doubt" to a "preponderance." Appellant's Opening Br. at 79. In support of this contention Turay asserts that "although the court's instructions to the jury recited the beyond a reasonable doubt standard of proof, they did not require the jury to find that [Turay] was a sexually violent predator by that strict standard of proof. . . . [because] the court instructed the jury that it might commit [him] if it found that he was a sexually violent predator by the preponderance, or more likely than not, standard." Appellant's Opening Br. at 81-82. The State counters this argument by asserting that "the jury instructions were in accordance with the law

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at 7. Dr. Dreiblatt's testimony demonstrates that while he considered some of the threats made by Turay, specifically those regarding physical or sexual violence, to be indicative of "antisocial behavior," he did not "penalize" Turay for threatening to sue staff at the SCC.

and did not reduce the State's burden of proof." Br. of Resp't and Cross-Appellant at 86.

RCW 71.09.060(1) provides that the "court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." RCW 71.09.020(1) defines a " 'sexually violent predator' " as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." In accordance with these statutes, the trial court instructed the jury that:

> To find that the respondent Richard Turay is a sexually violent predator, the State must prove each of the following elements *beyond a reasonable doubt*. One, that the respondent has been convicted of a crime of sexual violence, specifically rape in the second degree; two, that the respondent suffers from a mental abnormality; and, three, that such mental abnormality makes the respondent likely to engage in predatory acts of sexual violence.
>
> If after weighing all of the evidence you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that the respondent is not a sexually violent predator.

RP (Oct. 7, 1994) at 15-16 (emphasis added).

The trial court's instruction mirrored the language of the SVP statute, the constitutionality of which we upheld in *Young*. *Young*, 122 Wn.2d at 59. Indeed, in *Young*, we

rejected the very argument that Turay offers here.[20] *See Young*, 122 Wn.2d at 32 n. 9 (stating the statute "requires *proof beyond a reasonable doubt*"). Because we have previously considered, and rejected, the argument that Turay makes, we hold that trial court's instructions did not reduce the State's burden to a preponderance.

E. Annual Review

RCW 71.09.090(2) mandates that persons committed as SVPs receive an annual review hearing. At trial, Turay asserted that this statute violated equal protection because individuals committed under RCW 71.05, which governs the involuntary civil commitment of persons with serious mental disorders, receive review hearings every 180 days. The trial court agreed, and, in an attempt to cure this perceived constitutional defect, essentially grafted the 180-day review requirement of RCW 71.05 onto RCW 71.09.090(2). Turay contends here that the trial court should have struck down RCW 71.09.090 as void in its entirety rather than judicially rewriting the statute. In the alternative, Turay contends that if we determine that the annual review provision of RCW 71.09.090 does not

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[20] While the dissent disagrees with this conclusion, in his brief to this court, *Young*, like Turay in this case, claimed that RCW 71.09.060 did not impose a constitutionally adequate burden of proof because the statute "alters 'beyond a reasonable doubt' to whether the respondent is more likely than not to reoffend." *See* Br. of Resp't and Cross-Appellant, app. A, at 60. We squarely rejected that claim, however, and held that the statute was constitutional. *Young*, 122 Wn.2d at 59. Accordingly, the dissent's suggestion that *Young* did not reject the aforementioned argument is unfounded.

violate the equal protection guarantee of the United States Constitution, then we should hold that it violates the equal protection clause (article I, section 12) of Washington's Constitution.

In *Young*, we upheld the constitutionality of RCW 71.09, determining that "there are no substantive constitutional impediments to the sexually violent predator scheme." *Young*, 122 Wn.2d at 26. In addition, we stated that

> [a] person cannot be deprived of procedural protections afforded other individuals merely because the State makes the decision to seek commitment under one statute rather than another statute. Thus, in regard to the *initial determination* of whether there is probable cause for detention, an individual is entitled to the same opportunity to appear before the court to contest detention in any civil commitment proceeding.

Young, 122 Wn.2d at 45-46 (citations omitted; emphasis added). Turay claims that "[t]he same conclusion is compelled here, under the same binding precedent that compelled the *Young* decision; to paraphrase this Court, 'in regard to the [postcommitment] determination of whether there is [sufficient evidence to continue] detention, an individual is entitled to the same [procedures to contest detention] in any civil commitment proceeding.' "[21] Appellant's Opening Br. at 24 (citing *Young*, 122

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[21] Turay's "paraphrasing" of this language is disingenuous because he, under the guise of quotation marks, changed the entire structure of the sentence he quoted, thereby completely

Wn.2d at 45-46). Turay's reliance upon this language in *Young*, however, is erroneous because in the passage that he cited we expressly referred to the *initial determination* of probable cause, not a *subsequent recommitment*. Turay's case is, therefore, distinguishable because he is challenging the timing of his annual review hearing, rather than an initial determination of whether there is probable cause for detention.

Turay goes on to contend that his argument "is particularly true given that this Court must apply the 'strict scrutiny' test to this equal protection challenge." Appellant's Opening Br. at 24 n.2. This contention is patently erroneous. In *Young* we applied the strict scrutiny test "to the Statute as a whole." *Young*, 122 Wn.2d at 26. However, we did not apply strict scrutiny in our analysis of *Young*'s equal protection challenge to RCW 71.09. To the contrary, a close examination of our holding indicates that we applied the rational basis test. *See Young*, 122 Wn.2d at 45 (stating " '[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have *some relevance* to the purpose for which the classification is made' ") (emphasis added) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 76, 15 L.Ed.2d 620 (1966)).

The rational basis test was the correct standard to apply in *Young*, as it is here, because "[c]ourts have

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altering its meaning, in order to bend the language to support his conclusion. In short, Turay took all of the language in the sentence referring to an initial determination of probable cause and changed it to refer to "post-commitment" determinations, and dubbed this shenanigan "paraphrasing."

uniformly applied the rational relationship test to the statutes creating differing classes of persons for purposes of involuntary commitment statutes." *In re Detention of Patterson*, 90 Wn.2d 144, 149-50, 579 P.2d 1335 (1978), *overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984); *see also In re Personal Restraint of Kolocotronis*, 99 Wn.2d 147, 155, 660 P.2d 731 (1983); *In re Personal Restraint of Harris*, 94 Wn.2d 430, 436, 617 P.2d 739 (1980). Moreover, in *Dydasco*, we expressly held that "[w]hen addressing the constitutionality of civil commitment statutes creating differing classes of persons, we apply *rational basis scrutiny*." *In re Detention of Dydasco*, 135 Wn.2d 943, 951, 959 P.2d 1111 (1998) (emphasis added) (citing *Patterson*, 90 Wn.2d at 149-50).

The rational basis standard of review is relaxed and highly deferential. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998). Under this standard "a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Furthermore, the "burden is on the party challenging the classification to show that it is purely arbitrary." *Thorne*, 129 Wn.2d at 771.

In our view, there is a rational basis for distinguishing between SVPs and other mentally ill persons. *See Young*, 122 Wn.2d at 26 (holding that "it is irrefutable that the State has a *compelling interest* both in treating sex predators and protecting society from their actions") (emphasis added). Accordingly, in *Young* we recognized that "there are good reasons to treat mentally ill people differently than violent sex offenders." *Young*, 122 Wn.2d at 44-45. In addition, the Legislature has specifically

found that "the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act." RCW 71.09.010. Moreover, while individuals committed under the RCW 71.05 do not necessarily constitute a danger to public safety, individuals committed under RCW 71.09 are by definition dangerous to others because they have already committed at least one sexually violent act.[22] *See* RCW 71.09.020(1); RCW 71.09.030. Accordingly, there is often an extraordinarily higher public safety interest at stake when dealing with SVPs committed under RCW 71.09 than with individuals committed under RCW 71.05.

The combination of the aforementioned factors demonstrates that the annual review provision for individuals

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[22] The State may petition to involuntarily commit a person under RCW 71.05.150(1)(a) if that person "[p]resents a likelihood of serious harm" or "is gravely disabled." The legislature defined "likelihood of serious harm" as meaning that there is a substantial risk that the person will commit physical harm upon themselves, another person, or upon the property of others. RCW 71.05.020(14). The Legislature defined "gravely disabled" as a condition in which the person, as a result of a mental disorder, is in danger of serious physical harm because they cannot provide for their essential human needs of health or safety, or manifests severe deterioration in routine functioning so that he or she is not receiving such care as is essential for their health or safety. RCW 71.05.020(9). Accordingly, an individual committed under RCW 71.05 does not necessarily pose a threat to public safety.

committed under RCW 71.09.090 clearly serves a "legitimate state purpose" and is in no way "arbitrary." The rational basis test is thus satisfied and, therefore, the annual commitment review hearings under RCW 71.09.090 do not violate the equal protection clause.[23]

Finally, Turay argues that if we determine that annual review provision of RCW 71.09.090 does not violate the equal protection guarantee of the United States Constitution, then we should hold that it violates the equal protection clause of the Washington State Constitution. Although Turay engaged in the required *Gunwall*[24] analysis, his argument fails. This is so because a long line of Washington cases establishes that the two clauses have the same impact. For example, in *Housing Auth. v. Saylors*, 87 Wn.2d 732, 738-39, 557 P.2d 321 (1976), we stated that "the equal protection clause of the federal constitution and the privileges and immunities clause of the state constitution are substantially identical in their impact upon state legislation." Further, we held that "[w]here

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[23] Authority from other jurisdictions supports this conclusion. *See People v. Williams*, 228 Mich. App. 546, 580 N.W.2d 438, 443, *appeal denied*, 589 N.W.2d 287 (1998) (holding that "a different procedure for release from detention for criminal sexual psychopathic persons than that set forth elsewhere for those acquitted on the bases of insanity and others who have been civilly committed" does not violate equal protection); *Williams v. Wallis*, 734 F.2d 1434, 1437 (11th Cir. 1984) (holding that Alabama's release procedures for insanity acquittees did not violate the equal protection clause, even though they differed from the release procedures governing other civil committees).

[24] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986).

language of our state constitution is similar to that of the federal constitution, we have held that the language of the state constitutional provision should receive the same definition and interpretation as that which has been given to the federal provision." *Housing Auth.*, 87 Wn.2d at 739; *see also Standing v. Department of Labor & Indus.*, 92 Wn.2d 463, 467, 598 P.2d 725 (1979) (holding that "the state [equal protection] clause usually is to be given the same interpretation as the federal clause)"; *In re Olsen v. Delmore*, 48 Wn.2d 545, 550, 295 P.2d 324 (1956) (holding that article I, section 12 of the Washington State Constitution "is substantially identical with the equal protection clause of the fourteenth amendment"); *Texas Co. v. Cohn*, 8 Wn.2d 360, 374, 112 P.2d 522 (1941) (holding that "this court regards the equal privileges and immunities provision of Art. I, § 12, of the state constitution and the equal protection clause of the fourteenth amendment to the constitution of the United States as substantially identical").[25]

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[25] The dissenting justice pays insufficient homage to the large body of case law we have cited above, which stands for the proposition that the equal protection clause of the federal constitution and article I, section 12 of the Washington constitution are substantially identical in their impact upon state legislation. Instead, the dissent asserts that article I, section 12 might provide Turay with greater protection than he would receive under the federal equal protection clause. In support of this assertion, the dissenting justice primarily relies upon the following sources: (1) dicta in *Griffin v. Eller*, 130 Wn.2d 58, 922 P.2d 788 (1996); (2) a concurring opinion in *State v. Smith*, 117 Wn.2d 263, 814 P.2d 652 (1991); and (3) *Darrin v. Gould*, 85 Wn.2d 859, 540 P.2d 882 (1975). The first two sources clearly are not binding on this court. The third source, *Darrin*, states, in relevant part, that "Const. art 1, § 12, the state's

In summary, we believe that the annual review provision of RCW 71.09.090 clearly survives Turay's equal protection challenge.

F. The Trial Court's Denial of Turay's Motion to Seal the Commitment Proceeding

Turay contends that the trial court erred in denying his motion to seal the commitment proceedings. He argues, in support of that motion, that because a court

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version of the equal protection clause, has been construed in a manner similar to that of the equal protection clause of the Fourteenth Amendment. Such construction, however, is not automatically compelled. Const. art. 1, § 12 may be construed to provide greater protection to individual rights than that provided by the equal protection clause." *Darrin*, 85 Wn.2d at 868 (citations omitted). This case is, however, of little precedential value, because it relies solely upon *Carter v. University of Washington*, 85 Wn.2d 391, 536 P.2d 618 (1975), to support the aforementioned statement. *Carter* is a plurality opinion, which has been *expressly overruled* by this court in *Housing Auth. Housing Auth.*, 87 Wn.2d at 739-40. In *Housing Auth.*, a majority of this court appeared to chide the *Carter* plurality for "refusing to accept the United States Supreme Court's interpretation of constitutional requirements of equal protection." *Housing Auth.*, 87 Wn.2d at 739. Furthermore, we stated that "[i]t would appear that Const. art. 1, § 12, is less liberal than U.S. Const. amend. 14, if a distinction between the two is to be found in the language used, for it expressly authorizes the legislature to impose terms upon the enjoyment of a privilege." *Housing Auth.*, 87 Wn.2d at 740 n. 3 (emphasis added). In short, although this court could certainly determine that article 1, section 12 provides greater protection than the federal equal protection clause, the aforementioned case law demonstrates that heretofore we have not done so and we are not inclined to do so under these facts.

may seal RCW 71.05 commitment proceedings, its failure to do so here constituted a violation of equal protection.[26] The State asserts that the trial court did not err in denying Turay's motion because "proceedings held under RCW 71.09 are presumptively open, and should not be closed to protect the reduced privacy interest of convicted sex offenders." Br. of Resp't and Cross Appellant at 78.

The sole authority Turay cites to support this claim is *In re Detention of D.A.H.*, 84 Wn.App. 102, 924 P.2d 49 (1996). In that case, the Court of Appeals held that *probable cause hearings* under RCW 71.09.040 are presumptively closed because during the duration of that hearing an alleged SVP is similarly situated to individuals appearing at probable cause hearings under RCW 71.05, and, thus, equal protection requires that the same confidentiality and closure protections apply to both individuals. The court, therefore, reasoned that since proceedings under RCW 71.05 are presumptively closed to the public, the

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[26] Turay was not entirely candid with this Court in his statement of this claim. The trial court did not completely deny his motion to seal the proceedings, but rather ruled that:

"With regard to the alternative motion to seal the court file and seal the courtroom, I would deny that motion in the form that it was made. The Court would entertain requests as to specific documents or specific testimony where a showing can be made that the right to privacy that Mr. Turay does have could outweigh the public interest in having access to those documents, or to that testimony. So counsel are free to raise those issues at the times that they feel are appropriate." RP (Sept. 20, 1994) at 90-91. No such request by Turay was subsequently forthcoming.

equal protection clause mandated that probable cause hearings under RCW 71.09.040 also be sealed. *D.A.H.* is distinguishable, however, because the Court of Appeals explicitly limited its holding in that case to *probable cause hearings* under RCW 71.09.040, and refused to extend its analysis to the actual SVP *commitment trial* under RCW 71.09.060. In addition, we note that *D.A.H.* does not appear to be consistent with case law from this court. We, therefore, question its continued validity. *See, e.g., In re Detention of Campbell,* 139 No. 63986-8, slip op. at 19-21 (Wash. 1999) (holding that the trial court did not violate a sexually violent predator's privacy rights by refusing to seal his commitment proceedings because sex offenders threaten public safety and have reduced privacy interests due to the fact that the "specific modus operandi of sex offenders, preying on vulnerable strangers or grooming potential victims, is markedly different from the behavior of other types of persons civilly committed and such dangerous behavior creates a need for disclosure of information about convicted sex offenders to the public"); *In re Detention of Petersen,* 138 Wn.2d 70, 93-94, 980 P.2d 1204 (1999) (holding that the commitment procedures for sexually violent predators need not mirror those for individuals committed under RCW 71.05).

In the final analysis, we have a long tradition of keeping courtrooms open in this state, and there is certainly a rational basis for doing so here. *See Allied Daily Newspapers v. Eikenberry,* 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (holding that "[w]e adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice"); *Cohen v. Everett City*

Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975). Accordingly, we reject Turay's claim that the trial court's refusal to seal the proceedings violated his right to equal protection.

G. Constitutionality of the Conditions of Confinement "As Applied" to Turay

In *Young*, we held that the SVP statute, RCW 71.09, was "civil rather than criminal, and does not violate either the prohibition against ex post facto laws *or the double jeopardy clause.*"[27] *Young*, 122 Wn.2d at 59 (emphasis added). Further, in *Kansas v. Hendricks*, 521 U.S. 346, 371, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the United States Supreme Court held that Kansas's Sexually Violent Predator Act, which is almost identical to our SVP statute, "comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post facto* lawmaking." Turay seemingly ignores those decisions by alleging that the conditions of confinement at the SCC violate the double jeopardy clause. He attempts to distinguish his case from *Young* and *Hendricks* by asserting that the conditions at the SCC are punitive and thereby render RCW 71.09 a criminal statute "as applied" to him, and thus violative of the double jeopardy clause. Appellant's Opening Br. at 39. Further, Turay claims that in order to

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[27] The double jeopardy clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

remedy this violation of his constitutional rights, we must order his release.

The State contends that Turay "mischaracterizes the nature of his challenge and misunderstands the nature of a challenge to a statute 'as applied.' " Br. of Resp't and Cross-Appellant at 50. Specifically, the State claims that

> [a]ny alleged deficiencies in the treatment offered by the SCC do not go to deficiencies in the *Statute*, but to deficiencies in the administrative implementation of the Statute. . . . As such, a challenge to these conditions cannot properly be characterized as a challenge to the Statute 'as applied.'

Br. of Resp't and Cross-Appellant at 60-61. In addition, the State asserts that "any alleged inadequacies in the implementation of the Statute by government administrators, particularly when the alleged inadequacies concern conditions at a facility which are remedial in nature, cannot impact the constitutionality of the Statute itself." Br. of Resp't and Cross-Appellant at 52-53.

We believe that Turay's "as applied" double jeopardy challenge to RCW 71.09, based upon the conditions at the SCC, rather than the language of the statute, is flawed. In order to establish a double jeopardy claim, Turay must present a "high level of proof" that the statutory scheme he is challenging (RCW 71.09) is so punitive that it must be considered criminal and not civil. *Young*, 122 Wn.2d at 20; *see also Allen v. Illinois*, 478 U.S. 364, 369, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986). In *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 493, 139 L.Ed.2d 450 (1997), the Supreme Court clarified the two-part test for determining

whether a particular sanction is criminal or civil for purposes of double jeopardy analysis, stating:

> A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' *Ward*, 448 U.S. [242, 248, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)]. Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' *id.*, at 248-249, as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,' *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 [, 76 S.Ct. 219, 100 L.Ed.2d 149] (1956).

Hudson, 522 U.S. at 99. Further, in making the latter determination, the Supreme Court stated that " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 100 (quoting *United States v. Ward*, 448 U.S. 242, 249, 100 S.Ct. 2636, 65 L.Ed.2d (1980)).

We applied the aforementioned double jeopardy test in *Young*, and determined that RCW 71.09 passed constitutional muster. *See Young*, 122 Wn.2d at 18-23. Furthermore, we subsequently expressly adopted this test for "the purpose of determining whether a statute is remedial or punitive under article I, section 9 of our state constitution." *Winchester v. Stein*, 135 Wn.2d 835, 845, 959 P.2d 1077 (1998); *see also State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997). Accordingly, despite the fact that the case law clearly establishes the proper double jeopardy

test to apply, Turay is advocating the use of an erroneous test.[28]

In an attempt to buttress his "as applied" challenge, Turay cites *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), *overruled by Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 493, 139 L.Ed.2d 450 (1997), as standing for the proposition that a civil or criminal sanction constitutes punishment when the sanction *as applied* in the particular case serves the goals of punishment. However, in *Hudson*, 522 U.S. at 96, the Supreme Court "disavow[ed] the method of analysis used in *United States v. Halper*." The Supreme Court reasoned that the

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[28] Turay's claim demonstrates a misunderstanding of the nature of an "as applied" constitutional challenge to a statute. Justice Antonin Scalia, of the United States Supreme Court, set forth a basic overview of the application of an "as applied challenge" when he stated:

"Statutes are ordinarily challenged, and their constitutionality evaluated, 'as applied' – that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional 'as applied' is to *prevent its future application in a similar context, but not to render it utterly inoperative*. To achieve the latter result, the plaintiff must succeed in challenging the statute 'on its face.' Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting) (first emphasis added). While this dissenting opinion does not constitute binding authority, it does provide an excellent framework for the analysis of Turay's "as applied" challenge to the constitutionality of RCW 71.09.

> analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. First, the *Halper* Court bypassed the threshold question: whether the successive punishment at issue is a 'criminal' punishment. . . . The second significant departure in *Halper* was the Court's decision to 'asses[s] the character of the actual sanctions imposed,' rather than, as *Kennedy [v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)] demanded, *evaluating the 'statute on its face'* to determine whether it provided for what amounted to a criminal sanction.

Hudson, 522 U.S. at 101 (emphasis added) (citations omitted). Finally, the court concluded that

> *Halper*'s deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable.[29]

Hudson, 522 U.S. at 101-02 (footnote omitted).

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[29] In addition, the court stated: "Under *Halper*'s method of analysis, a court must also look at the 'sanction actually imposed' to determine whether the Double Jeopardy Clause is implicated. Thus, it will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. *But in those cases where the civil proceeding follows the criminal proceeding*, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even *'attempting* a second time to punish criminally.' " *Hudson*, 522 U.S. at 102 (first emphasis added).

It is evident that the United States Supreme Court squarely rejected the double jeopardy analysis used in *Halper*, thereby rendering Turay's citation of the case of no value. Furthermore, *Hudson* clearly stands for the proposition that, in performing double jeopardy analysis, a court must look at the statute *on its face* to determine whether it actually provides for a criminal sanction, rather than evaluating the character of the actual sanctions as imposed.[30] It is also noteworthy that the Supreme

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[30] While one could argue that *Hudson* is distinguishable because the sanctions involved in that case were a monetary penalty and occupational disbarment, rather than confinement, such an argument would fail because the Supreme Court explicitly stated that in determining whether a statutory scheme is so punitive that it actually constitutes a criminal penalty, among the factors to be considered are whether " 'the sanction involves an affirmative disability or restraint" and that this factor, along with the others, "must be considered in relation to the statute *on its face.*' " *Hudson*, 522 U.S. at 99, 100 (emphasis added) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). Furthermore, the dissent's contention that Turay's as applied double jeopardy challenge is proper ignores the plain language of *Hudson*. We believe that the Supreme Court meant what it said when it mandated in *Hudson* that, when performing a double jeopardy analysis, statutes must be evaluated on their face rather than assessing the character of the actual sanctions imposed. The dissent apparently feels otherwise and attempts to buttress its view by contending that in *Hudson* the Supreme Court distinguished cases involving an affirmative disability or restraint. This is not, in our view, a correct reading of *Hudson*. In *Hudson*, the Supreme Court expressly stated that while there are several factors which serve as useful guideposts in performing a double jeopardy analysis, none of these factors, including whether the sanction involves an affirmative disability or restraint, should be evaluated to "dispositive status" or

Court decided *Hudson* after *Hendricks* and yet reaffirmed its ruling that a double jeopardy challenge to a statute must be made facially rather than by assessing the character of the actual sanctions imposed i.e., as applied. *Hudson*, 522 U.S. at 100-02.

In *Winchester*, consistent with the Supreme Court's holding in *Hudson*, we expressly held that when performing double jeopardy analysis "[t]he focus . . . is on the sanction allowed by the statute, not the actual sanction imposed in a particular case." *Winchester*, 135 Wn.2d at 847. In addition, we stated that "[a] legislature's designation of a penalty as civil is entitled to considerable deference and that designation will not be overborne unless the statute, considered *on its face and without reference to the level of sanction imposed in the particular case*, is clearly so punitive as to render it criminal despite the legislature's intent to the contrary." *Winchester*, 135 Wn.2d at 853 (emphasis added). Accordingly, the State is correct that Turay's "as applied" challenge relating to the administration of the statute simply does not support a double jeopardy claim.[31]

"considered controlling." *Hudson*, 522 U.S. at 101. Accordingly, the dissent's attempt to distinguish *Hudson* is unpersuasive.

[31] Turay also contends, that "if recent U.S. Supreme Court precedent casts doubt on the ability of a court to consider the application of a sanction in deciding whether the statute imposes punishment for double jeopardy purposes under federal law, this Court may still consider this double jeopardy question under state law, Wash. Const. art. 1, § 9." Reply Br. at 23-24. This contention is meritless because in *Winchester* we held that the test for double jeopardy is same under both the state and federal constitutions. *Winchester*, 135 Wn.2d at 845-46.

The fact that a federal court recently found that the conditions of confinement at the SCC do not yet meet constitutional standards is irrelevant to our holding here because Turay's remedy for these unconstitutional conditions is not a release from confinement.[32] Turay's remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action and/or an award of damages.[33] He has already received both monetary damages and an injunction via his federal litigation. Furthermore, the federal court is maintaining a zealous watch over the conditions at SCC to enforce the injunction that it put in place. Accordingly, Turay has an adequate remedy that will guarantee that the conditions at the SCC will meet or exceed constitutional standards.

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[32] This conclusion is supported by case law from other jurisdictions. In a similar case involving a sexual predator, the Wisconsin Court of Appeals held:

"[T]he State argues persuasively that even if Seibert [the sexual predator] were correct that the center failed to develop a treatment program for his special needs, his conclusion that he should be released would place society at risk for his acts of sexual violence and produces an absurd result. Rather, they argue, his remedy is to litigate that issue and, if successful, obtain appropriate treatment, not supervised release. We agree." *State v. Seibert*, 220 Wis.2d 308, 582 N.W.2d 745, 749, *review denied*, 220 Wis.2d 366, 585 N.W.2d 158 (1998); *see also Carson v. Johnson*, 112 F.3d 818, 820 (5th Cir.1997) ("Generally, § 1983 suits are the proper vehicle to attack unconstitutional conditions of confinement").

[33] In addition, as the Supreme Court noted in *Hudson*, the "Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational." *Hudson*, 522 U.S. at 103 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)).

We are not unmindful of the fact that the Ninth Circuit Court of Appeals has recently held that *Hendricks* "does not preclude the possibility that the Washington [SVP] statute, *as applied*, is punitive."[34] *Young v. Weston*, 176 F.3d 1196, 1199 (9th Cir.1999). This court is, of course, not bound by that decision and, for the aforementioned reasons, we decline to follow it. Assuming arguendo, however, that the Ninth Circuit is correct that a person committed as an SVP under RCW 71.09 may challenge that statute as violative of double jeopardy "as applied to them," rather than facially, Turay's claim would still be unsuccessful.

As previously noted, in order to prevail on a double jeopardy claim, "a party challenging the statute [must] provide[ ] 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Hendricks*, 521 U.S. at 361 (alteration in original) (quoting *Ward*, 448 U.S. at 248-49); *see also Young*, 122 Wn.2d at 19-20. Accordingly, Turay must prove not only that the conditions of his confinement are constitutionally deficient in some manner, but that these deficiencies are "so punitive" that they wholly render the application of RCW 71.09 criminal rather than civil.

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[34] It is significant, however, that in *Hendricks*, the Supreme Court flatly rejected Hendricks's contention that the SVP statute *"as applied to him . . . violates double jeopardy principles* because his confinement under the Act, imposed after a conviction and a term of incarceration, amounted to both a second prosecution and a second punishment for the same offense." *Hendricks*, 521 U.S. at 369 (emphasis added).

Turay has clearly failed to carry his burden of proof. This conclusion is evidenced by the fact that the trial court expressly held that the SCC's failure to provide Turay, in some respects, with constitutionally adequate treatment did not render RCW 71.09 punitive as applied. Further, the federal district court, noting that "[p]rogress has been made since the October 1998 hearing toward compliance with the injunction[,]" has also refused to find that the conditions at the SCC mandate Turay's release. *Turay v. Weston*, No. C91-664WD, Order on Renewed Mots. for Contempt, at 3 (May 27, 1999). In addition, the federal court, as noted above, will continue to monitor the SCC's progress toward compliance with the injunction in order to ensure that Turay receives constitutionally adequate care. As a result, it is evident the deficiencies in Turay's treatment at the SCC are in the process of being remedied. We agree, therefore, with the trial court and the federal district court's refusal to order Turay's release. Accordingly, even if Turay's "as applied" challenge to RCW 71.09 is proper, he has failed to establish by "the clearest proof" that the deficiencies in his treatment at the SCC render that statute "so punitive" that it is actually criminal in nature and, therefore, requires his release. *See Campbell*, No. 63986-8 slip op. at 9 (Wash. 1999) (citations omitted) (holding that, to the extent that the defendant's claim was proper, he had failed to sufficiently prove that the conditions of confinement at the SCC constitute punishment so as to render RCW 71.09 criminal in nature and unconstitutional as applied to him).

In short, we reject Turay's claim that the conditions of confinement at the SCC are punitive "as applied" to

him and thus violative of the double jeopardy clause. Further, we deny his effort to have us overrule our decision in *Young*, insofar as a facial challenge to RCW 71.09 is concerned. Turay's remedy for the unconstitutional conditions is a § 1983 suit or an injunction action, such as he has already instituted.

III. SUBSTANTIVE ISSUES RAISED BY THE STATE

A. Annual Review

The State contends that the trial court erred when it concluded that the annual review provision of RCW 71.09.090(2) violated equal protection and, as a result, grafted the 180-day review requirement of RCW 71.05 onto RCW 71.09.090(2). As we have previously discussed, the annual review provision of RCW 71.09.090(2) does not violate equal protection. Accordingly, we overrule the trial court's attempt to judicially amend RCW 71.09.090(2) to require review every 180 days.

B. Burden of Proof at the Show Cause Hearing under RCW 71.09.090(2)

As previously stated, RCW 71.09.090(2) provides that an individual committed under RCW 71.09 is entitled to an annual show cause hearing "to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged." The trial court held that this statute does not clearly state which party bears the burden of proof at the show cause hearing, and thus "[t]o the

extent that the burden of proof is placed upon the respondent, the statute violates his due process rights." CP at 1157. As a result, the trial court ruled that "*the burden is on the state* to show that the respondent is currently suffering from a mental abnormality or personality disorder which makes the respondent likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged." CP at 1157 (emphasis added). The State argues that the trial court erred in this ruling, but that

> should this Court determine that the trial court was correct and that due process requires the State to bear the burden of proof at the show cause hearing, no action on this case is warranted. Since the trial court required the State to bear the burden of proof at Turay's show cause hearing, Turay has suffered no prejudice.

Br. of Resp't and Cross-Appellant at 38.

The United States Supreme Court has unequivocally held that "in civil commitment proceedings *the State must establish* the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence." *Foucha v. Louisiana*, 504 U.S. 71, 86, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (emphasis added). This language clearly indicates that due process requires the State to bear the burden of proof in all civil commitment proceedings, thereby buttressing the ruling of the trial court. Furthermore, in *Young*, we held that "before a person can be civilly committed, *the State must prove* that the individual is mentally ill and dangerous." *Young*, 122 Wn.2d at 37 (emphasis added; footnote omitted). Accordingly, both this court and the United States Supreme Court agree that

the State must bear the burden of proof in involuntary civil commitment hearings, and, therefore, the trial court was correct in determining that due process requires that the burden of proof remain upon the State in the show cause hearing. We, therefore, reject the State's contention that it does not have to bear the burden of proof in show cause hearings held pursuant to RCW 71.09.090.

CONCLUSION

Turay raised a plethora of issues regarding the validity of his continued confinement at the SCC pursuant to the 1994 order of commitment that the King County Superior Court entered against him. For the reasons we have set forth above, we conclude that the record in this case supports the order of commitment, and, therefore, we affirm that order. We further conclude that the trial court erroneously determined that RCW 71.09.090's annual review provision violated Turay's right to equal protection, and, thus, we overrule the trial court in respect to that issue. Finally, we affirm the trial court's ruling that the State must bear the burden of proof in show cause hearings held pursuant to RCW 71.09.090(2).

/s/ Alexander, J

WE CONCUR:

/s/ Guy C. J.

/s/ Smith, J.

/s/ Johnson, J.

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/s/ Talmadge, J.

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/s/ Dolliver, J.P.T.

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SANDERS, J. (dissenting) – Under the guise of a civil commitment facially justified to accomplish remedial treatment, not punishment, Richard Turay challenges not only the procedure by which he was imprisoned but the abject refusal of the trial court to substantively consider the actual conditions of his confinement. I will highlight my critical disagreements with the majority under appropriate headings, attempting to follow the majority's order of presentation.

I.

Denial of Motion to Vacate is an Appealable Order

At the threshold, the majority diminishes the prisoner's access to whatever justice may be provided through appellate review by claiming this prisoner's appeal from the order of May 9, 1996 denying his motion to vacate the judgment of commitment cannot be pursued as a matter of right, but only by discretionary review. The order sought to be reviewed denied Turay's motion to vacate this judgment of commitment based upon proof of the punitive conditions, and lack of treatment, associated with the prisoner's actual confinement. Clerk's Papers (CP) at 949 ("to vacate the RCW 71.09 commitment of Mr. Turay."). The trial court excluded this evidence during the trial in chief causing Turay to subsequently file a motion to vacate on this ground. Pursuant to RAP 2.2(a)(10), "An order granting or denying a motion to vacate a judgment" is appealable as a matter of right; therefore the order denying Turay's motion to vacate is also appealable of right.

II.

Constitutional Right to Represent Oneself

The sixth and fourteenth amendments of the United States Constitution guarantee the right to counsel in state proceedings where liberty is at stake. *Tetro v. Tetro*, 86 Wn.2d 252, 544 P.2d 17 (1975). This right to counsel includes the right to represent oneself in the alternative to utilizing a retained or appointed counsel. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Although we might question Turay's choice to represent himself, Turay does have the absolute constitutional right to waive the assistance of retained or appointed counsel:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Id. at 820 (footnote omitted). That is not to say there is no required form in which the right to self-representation must be asserted. Rather, the request "must be knowing and intelligent, timely and not for the purpose of delay,

and unequivocal." *Adams v. Carroll*, 875 F.2d 1441, 1442 (9th Cir. 1989) (citations omitted).[1]

Essentially the majority finds no error on review of the trial court's denial of Turay's request to self-representation, asserting this request was "equivocal" in the sense that it was posed in the alternative to representation by counsel of his choice. ("He prefaced this comment [" 'to represent myself with standby counsel' "], however, with several requests to have Mark Mestel, an attorney who had represented him at his first commitment trial, represent him again." Majority at 16.).

When Turay learned his attorney of choice was unavailable, he unequivocally requested the court to permit him to proceed pro se: "I don't even know if I got a decision from you yet whether it's possible to represent myself." Videotape Recorded Proceedings (VRP) 11/16/93 at 11. Yet the trial court refused to consider Turay's request: "All I want you to do is work with Ms. Shaw. We don't have time right now, given the lateness of

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[1] The majority asserts that "the dissent fails to sufficiently appreciate the strong presumption against a defendant's effective waiver of his or her right to counsel." Majority at 19 n.13 (citing *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) and *State v. Robtoy*, 98 Wn.2d 30, 40, 653 P.2d 284 (1982)). The presumption against waiver of counsel is not, however, a presumption against one's substituting self-representation for retained or appointed representation. These cases involved the waiver of the right to counsel during a *custodial interrogation* – not an election of self-representation at trial. The majority cites no authority to support the claim that one is presumed not to elect self-representation at trial.

the hour, to go into all of this. . . . Work with her. I think everything would go faster, it would go smoother." *Id.*

Notwithstanding, Turay persisted and again pressured the court to decide his motion for self-representation:

> You still haven't ruled yet on whether I can – and I had the motion here and you said last week you didn't want to hear it, and I brought it back with me again. This motion is to represent myself with a standby counsel.

Id. at 12-13. While Turay clearly wanted Mestel appointed, equally clear was his desire to represent himself in the event the court denied his motion for substitute counsel.

A conditional request is not an equivocal one. *Adams* is directly on point. In *Adams* the Ninth Circuit examined whether "a request to proceed without counsel [is] unequivocal where the defendant consistently wishes to invoke the right only as an alternative to the appointment of a particular defense attorney." *Adams*, 875 F.2d at 1442. The court held an alternative request is *not* thereby rendered an equivocal one.

> Throughout the period before trial, Adams repeatedly indicated his desire to represent himself if the only alternative was the appointment of Carroll. While his requests no doubt were *conditional*, they were not equivocal.

Id. at 1445.[2]

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[2] The majority points to Turay's February 1994 motion as evidence of his equivocation. "Further, it is noteworthy that Turay's request to proceed without counsel was actually his

Although the majority asserts Turay was "ambivalent about whether he would accept the appointment of substitute counsel" (Majority at 17), the record reflects Turay consistently resisted the court's efforts to appoint an attorney other than Mestel.[3] In fact, Turay clearly articulated his reasons for declining Ms. Shaw's representation: "[S]he's probably a real smart person, you know, but there are several people out at the Special Commitment Center that are doing a life sentence because the Public Defender's Office has represented 'em." VRP 11/16/93 at 7.

Even assuming Turay agreed to cooperate with Ms. Shaw, this does not render equivocal his persistent requests to proceed pro se. " 'After a clear denial of the request [to proceed pro se], a defendant need not make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal.' " *United States v. Arlt*, 41 F.3d 516, 523 (9th Cir. 1994) (emphasis

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third request, thereby undermining his assertion that his request was unequivocal." Majority at 18. But three requests seem more emphatic than one.

[3] *See* VRP 11/16/93 at 6 (Turay asked the court if "You think we could just maybe postpone this [appointing Ms. Shaw] for a little bit until you find out from Mark of what's going on instead of coming to any hasty decision?"); *see also* VRP 11/16/93 at 14 (Turay stated, "As long as the Court realizes that, you know, I haven't made that decision [to work with Ms. Shaw]. . . . I could probably make a decision after we talked. . . . I – I'm not going to, you know, say no to that, but, at the same time, I don't want – I would ask that this Court not make any ruling that she is appointed by the court as my counsel, though.").

omitted) (quoting *Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir. 1982)).

As the trial court unquestionably denied Turay's request to represent himself,[4] it should be equally clear Turay made the request. Turay's attempt to make the best of his remaining options does not make his prior request "equivocal."

The Supreme Court recently reaffirmed denial of the right to self-representation is not subject to a harmless error analysis but is "subject to automatic reversal." *Neder v. United States*, ___ U.S. ___, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999). Turay's commitment must therefore be reversed on this ground if no other.

III.

Penalizing Turay for Pursuing his Legal Remedies

The trial court granted the state's motion in limine to exclude testimony regarding the actual conditions of Turay's confinement, and also denied Turay the right to rebut the State's expert witness, Dr. Irwin Dreiblatt, who testified to the effect Turay was suffering from a mental disorder justifying commitment evidenced by, amongst other things, "threats to sue." Verbatim Report of Proceedings (RP) 9/28/94 at 110. These threats to sue in part led Dr. Dreiblatt to testify, "he has an exaggerated sense

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[4] *See* Verbatim Report of Proceedings (RP) 2/25/94 at 2 ("THE COURT: The reason I asked for this hearing is because of the concerns that we dealt with the last time we were here and, in particular, Mr. Turay, *you had made a request to go pro se. I denied that request.*").

of self-importance, that he is a very important person, he can do all that." *Id.*

In a sense I agree with Dr. Dreiblatt. In a free society every individual including Turay *is* "a very important person," at least one indication of that importance being the unfettered right to access the courts to remedy one's legal grievances.

> "[E]very prisoner has a constitutional right of access to the courts to present any complaints he might have concerning his confinement. He cannot be disciplined in any manner for making a reasonable attempt to exercise that right. Access to the courts is a fundamental precept of our system of government. No citizen, regardless of his transgressions, is ever to be legally consigned to the total and unreviewed power of any single branch of government."

Inmates of Nebraska Penal & Correctional Complex v. Greenholtz, 436 F. Supp. 432, 436 (D. Neb. 1976) (quoting *Andrade v. Hauck*, 452 F.2d 1071, 1072 (5th Cir. 1971)), *aff'd*, 567 F.2d 1381 (8th Cir. 1977). *See also Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970).

But it is of supreme irony, in light of Dr. Dreiblatt's testimony, that Turay's federal lawsuit against the commitment center, and certain individuals associated with the center, was successful. This evidence was excluded from the trial even though it would have demonstrated not only Turay's rational decision to seek legal redress but also the merit of his claim. Notwithstanding, the trial judge withheld this part of the story from the jury, allowing Dr. Dreiblatt to get away with characterizing this man as a sex predator, at least in part, because he attempted to

legally defend himself against what all seem to concede are unconstitutional conditions of confinement.[5] The exclusion of Turay's rebuttal is especially aggravated in view of Dr. Dreiblatt's admission that threats to sue with a meritorious basis are *not* indicative of a narcissistic personality. RP 9/29/94 at 72 ("I wouldn't consider that narcissistic.").

The majority contends, "Dr. Dreiblatt determined that Turay's threats fell under an umbrella of a larger group of threats that Turay consistently made" (Majority at 28), and Dr. Dreiblatt's diagnosis of Turay was not even "influenced" by his threats to sue. But in fact it was *Dr. Dreiblatt's* testimony that he *considered* Turay's threats to sue as one factor in "the group of things that were going on" (RP 9/29/94 at 71), and therefore his testimony must have been "influenced" by these threats.

The trial court erred not because it allowed Dr. Dreiblatt to testify without objection but because it prevented any rebuttal from Turay. This denied Turay the right to mount a defense. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (citations omitted). The right to present witnesses is particularly important when

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[5] Not only did the state's testimony open the door to Turay's proposed rebuttal, which would have included an explanation about the factual basis for such a suit, but it highlights so-called expert testimony which draws an adverse psychological inference from the exercise of a prisoner's legal rights. Such testimony continues an unfortunate and dangerous trend. *Cf. In re Detention of Petersen*, 138 Wn.2d 70, 71 n.21, 980 P.2d 1204 (1999) (Sanders, J., dissenting).

a witness would rebut or explain evidence introduced by the government from which the jury might infer an element of the offense. *See, e.g., United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985) (error to prevent defendant from rebutting evidence introduced by the government from which jury might infer motive); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980) (error to exclude testimony that another man fit the description of the robber and used "bait" money to buy car).

The majority itself recognizes "[t]he introduction of testimony regarding an alleged SVP's [sexually violent predator] mental abnormality and/or personality disorder is not only appropriate, but it constitutes the very purpose of an SVP commitment proceeding." Majority at 28. But the majority denies Turay the right to discredit Dr. Dreiblatt's testimony, or even challenge factual assumptions which underlie it, with evidence of the actual conditions of confinement about which Turay justly complained. Exclusion of Turay's proposed testimony therefore left unchallenged, and immunized, the inference of a "mental abnormality" based on Turay's "narcissistic" promises to sue.

IV.

Beyond a Reasonable Doubt Means Beyond a Reasonable Doubt

The court instructed the jury:

> To find that the respondent Richard Turay is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt. One, that the respondent has been

> convicted of a crime of sexual violence, specifically rape in the second degree; two, that the respondent suffers from a mental abnormality; and, three, that such mental abnormality makes the respondent *likely* to engage in predatory acts of sexual violence.
>
> If after weighing all the evidence you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that the respondent is not a sexually violent predator.

RP 10/7/94 at 15-16 (emphasis added).

Turay persuasively argues this jury instruction, when read as a whole, lowers the burden of proof to a mere preponderance standard:

> [A]lthough the court's instructions to the jury recited the beyond a reasonable doubt standard of proof, they did not require the jury to find that Richard was a sexually violent predator by that strict standard of proof.
>
> . . . .
>
> A 100 percent certainty that there is a 51 percent chance that someone will commit predatory sexual acts in the future still demands only a 51 percent certainty.

Appellant's Opening Br. at 81-82.[6] We only upheld this statute against facial constitutional attack by holding

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[6] The jury was instructed separately that "likely" is defined as "a proposition [that] is more probably true than not." RP 10/7/94 at 18.

"[t]he burden is on the State to prove, beyond a reasonable doubt, that the detainee is a sexually violent predator, RCW 71.09.060(1)."[7] *In re Personal Restraint of Young*, 122 Wn.2d 1, 13, 857 P.2d 989 (1993). But here the prosecutor emphasized this instruction because it included the word "likely" to argue that burden had been reduced to a mere preponderance by rhetorically asking in closing argument: "[A]re you convinced that more likely than not at some future point in the future he will attempt to commit or commit a predatory act of sexual violence?" RP 10/7/94 at 117-18; and stating, "If you believe respondent is likely to commit an act of sexual violence, that's all that's meant." *Id.* at 37.

Due process guarantees an accused be protected "against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (emphasis added). Even under the language of this statute the prospect of reoffense is an essential fact to be proved "beyond a reasonable doubt." RCW 71.09.060(1). If we endorse a lower burden of proof we circumvent the statute, *Young*, and *Winship*, thereby permitting the state to indefinitely confine an individual on a "more likely than not" flip of the coin rather than strictly limiting commitment to only those who will otherwise reoffend "beyond a reasonable

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[7] RCW 71.09.060(1) expressly provides, "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator."

doubt."[8] As held in *Young* and *Winship*, when an accused is entitled to greater protection than that provided by the simple preponderance standard, an instruction which allows commitment on a mere preponderance is serious and reversible error. *Winship*, 397 U.S. at 363; *see also Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (holding constitutionally deficient reasonable doubt instruction required automatic reversal), *cert. denied*, 118 S. Ct. 1390, 140 L. Ed. 2d 649 (1998).

The majority summarily dismisses Turay's argument that the jury instructions erroneously reduced the burden of proof from "beyond a reasonable doubt" to a "preponderance" standard "[b]ecause we have previously considered, and rejected, the argument that Turay makes, we hold that the trial court's instructions did not reduce the State's burden to a preponderance." Majority at 29-30 (citing *Young*, 122 Wn.2d at 32 n.9). Not so.

Young did not reject this argument, in fact it expressly required proof beyond a reasonable doubt to honor the statutory requirement set forth in RCW 71.09.060(1) and

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[8] *See State v. Perez*, 90 Haw. Ct. App. 113, 128-29, 976 P.2d 427 (1998) (court's instruction jury must convict if "firmly convinced" of guilt diminished the very high burden of proof of beyond a reasonable doubt to that of clear and convincing evidence and constituted reversible error), *aff'd in part, rev'd in part*, 90 Haw. 65, 67, 976 P.2d 379 (1999); *see also State v. Baker*, 309 S.C. 436, 437, 424 S.E.2d 492 (1992) (instruction defining reasonable doubt as a "doubt arising from the evidence presented or lack of evidence that created a strong uncertainty in your minds" as to guilt violated due process as finding of guilt could be based on degree of proof below that required by the due process clause).

to save the statute from constitutional infirmity. The language relied upon by this majority was written by *Young*'s majority in a footnote to respond to the dissent's contention the sex predator act facially violates substantive due process. That footnote emphasized the beyond-a-reasonable-doubt standard as a rebuttal to claims of facial invalidity:

> The dissent seriously underplays the quantum of proof necessary to meet the dangerousness prong of the sex predator statute. The State must do far more than merely reprove a past criminal act, or present testimony from someone who thinks that individual is still dangerous. See dissent, at 62-65 [857 P.2d 989]. Instead, the statute requires *proof beyond a reasonable doubt* that the person has been convicted or charged with a crime of sexual violence, and suffers from a mental abnormality or personality disorder "which makes the person likely to engage in predatory acts of sexual violence". RCW 71.09.020(1).

Young, 122 Wn.2d at 32 n.9. *Young* thus expressly *adopted* the "beyond a reasonable doubt" standard; it certainly did not endorse an instruction phrased to defeat that standard.

And there is another reason why this error is so prejudicial: If an individual is indeed suffering from a mental condition that "makes" him likely to commit future acts of predatory violence, RCW 71.09.020(1), the existence of that volitional impairment must be proved beyond a reasonable doubt because this statute envisions future acts of sexual violence are a necessary and *defining* characteristic of the mental abnormality which makes

commitment appropriate. If we relax this standard our net catches not only those who will not necessarily reoffend as a result of an alleged mental condition but also dilutes the statutory definition of the necessary mental disorder.

A proper burden of proof instruction under this statute therefore also serves to focus and define the condition at issue to the exclusion of speculation based upon prior conduct indicative of simple volitional propensity. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) ("[E]vidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. ER 404(b)"); *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) ("When the sole purpose of the other crimes evidence is to show . . . propensity . . . there is no room for ad hoc balancing. The evidence is then unequivocally inadmissible. . . . " (quoting Edward W. Cleary, *McCormick on Evidence* § 190, at 565 (3d ed. 1984)); *State v. Irving*, 24 Wn. App. 370, 375, 601 P.2d 954 (1979) (propensity evidence obscures the peg of relevancy "by the dirty linen hung upon it.").

The necessity in a sex predator proceeding to distinguish evidence of a mental defect that "makes one reoffend" from simple propensity evidence that "one will probably reoffend in the future because he has offended in the past" is a distinction of critical importance in the case before us. Propensity evidence is *not* and cannot be evidence that one meets the statutory definition of "sexually violent predator" as one "who suffers from a mental abnormality or personality disorder which *makes* the person likely to engage in predatory acts of sexual violence if

not confined in a secure facility." RCW 71.09.020(1) (emphasis added).

Even if it were reasonable to assume Turay might reoffend because he has offended before, the statutory standard is not satisfied unless the prospect of reoffense is specifically *caused* by "a mental abnormality or personality disorder. . . . " This requires proof not only that the disorder exists but that the disorder, in and of itself, causes one to reoffend in the same sense that a cold causes the sniffles. It is therefore facially insufficient to demonstrate only that one has a disorder and that one will reoffend absent further proof, beyond a reasonable doubt, that the first causes the second. But evidence of this causal link is absent from this record, and specifically absent from the testimony of the state's expert. Dr. Dreiblatt testified that in his opinion Turay would reoffend not because the diagnosed disorder necessarily caused one to reoffend but because one who offended in the past is more likely to offend in the future, i.e., propensity:

> If there is one finding that overshadows all others in the area of prediction it is that the probability of future crimes increases with each prior criminal act. . . . [I]f a person is arrested four times, the probability that it will happen a fifth time is eighty percent. If a person is arrested ten times, the probability of an 11th arrest is ninety percent.

RP 9/29/94 at 98. Even if this is true it does not prove the statutory element, that the mental disorder "makes" the individual reoffend. Thus, the instruction as given obscures the statutory requirement that the disorder *cause*

[sic] one to reoffend as distinguished from proof of the prospect of reoffense due to simple propensity.

This instruction could be easily cured by simply reforming the last phrase to delete "likely to," thus making it read, "that such mental abnormality makes the respondent engage in predatory acts of sexual violence." Such would preserve the reasonable doubt standard thereby accurately restating the statutory elements in the context of the constitutional burden of proof. An appropriate instruction would then read:

> To find that the respondent Richard Turay is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt. One, that the respondent has been convicted of a crime of sexual violence, specifically rape in the second degree; two, that the respondent suffers from a mental abnormality; and, three, *that such mental abnormality makes the respondent engage in predatory acts of sexual violence.*

V.

Release is the Remedy for Unconstitutional Confinement

Turay contends release is the remedy to confinement under unconstitutional conditions. I agree but the majority does not. The majority follows closely the analysis set forth in the companion case of *In re Detention of Campbell*, No. 63986-8 (Wash. Oct. 21, 1999), which it cites for authority, Majority at 46-47, just as *Campbell* cites *Turay* for its authority. *In re Detention of Campbell*, slip op. at 9. However this majority at least admits the holding in

Young v. Weston, 176 F.3d 1196 (9th Cir. 1999), *amended*, ___ F.3d ___, 1999 WL 718467 (9th Cir. Sept. 16, 1999) (No. 98-353-77) (hereinafter "*amended* (Sept. 16, 1999)") is contrary to its position, whereas the majority in *Campbell* inconsistently attempts to distinguish it.

Where the majority opinion here is similar to the majority opinion in *In re Detention of Campbell*, I rely on my dissent in *Campbell* to adequately respond to the majority's misbegotten claim that the Constitution of our country does not protect individuals from unconstitutional confinement. But I here additionally respond to this majority's unique claim that an "as-applied" double jeopardy challenge must always fail as a matter of law.

The majority contends *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) stands for the proposition that "a double jeopardy challenge to a statute must be made facially rather than by assessing the character of the actual sanctions imposed, i.e., as applied." Majority at 41. The United States Court of Appeals in *Young* considered and then rejected this precise argument:

> Relying on *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), Washington argues that the conditions of confinement are irrelevant to the court's [double jeopardy] inquiry. We disagree. Whereas *Hudson* involved monetary penalties and disbarment, see id. at ___, 118 S.Ct. at 493, this case involves confinement. In cases considering the question whether confinement is criminal or civil, the Supreme Court has always looked to the actual conditions of confinement. *See, e.g. Hendricks*, 521 U.S. at 361-67, 117 S.Ct. at 2082-85; *Allen v. Illinois*, 478

U.S. 364, 373-74, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986); *see also Bell v. Wolfish*, 441 U.S. 520, 535-39 (1970).

Young, 176 F.3d at 1199 n.4, *amended* (Sept. 16, 1999).

Hudson questioned whether the previous imposition of civil monetary penalties raised a double jeopardy bar to subsequent criminal prosecution for illegal loans. It confined its analysis to answer the narrow issue "whether the imposition upon petitioners of monetary fines as *in personam* civil penalties by the Department of the Treasury, together with other sanctions, is 'punishment' for purposes of the Double Jeopardy Clause." *Hudson*, 118 S. Ct. at 494 n.5. *Hudson*'s majority specifically distinguished the sanctions imposed there – civil fine – from the sanction here – imprisonment: "While petitioners have been prohibited from further participating in the banking industry, this is 'certainly nothing approaching the "infamous punishment" of imprisonment.' " *Id.* at 496 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960)). That is the key distinction which our majority fails to credit.

While recognizing that "at least initially" the criminal versus the civil nature of the original sanction is a matter of statutory construction, 118 S. Ct. at 493, the Supreme Court, unlike the majority here, also recognizes that even if the initial sanction resulted from a statute facially civil in nature, that does not end the inquiry but rather requires an answer to the further question " 'whether the statutory scheme was so punitive either in purpose or *effect*,' . . . as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,' " 118 S. Ct. at 493

(alteration in original) (emphasis added) (citations omitted). Answering that latter question the Supreme Court employed the "useful guideposts" of the analysis set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) including:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson, 118 S. Ct. at 493 (citing *Kennedy*, 372 U.S. at 168-69).

Although the Supreme Court was not persuaded the monetary penalty at issue in *Hudson* was a criminal sanction in actual effect, the *Hudson* analysis, which relied upon the *Mendoza* factors, specifically distinguished punishment which "involve[s] an 'affirmative disability or restraint,' as that term is normally understood," *Hudson*, 118 S. Ct. at 496 (quoting *Flemming*, 363 U.S. at 617), from monetary assessments. The distinction between a monetary assessment on the one hand and punitive incarceration on the other was fundamental to the Supreme Court's analysis in *Hudson*, as it was equally fundamental to the United States Court of Appeals' analysis in *Young*. Yet this distinction is conspicuous by its absence from the majority opinion here. By analogy this distinction

between superficial form and substantive effect might be illustrated by the personal injury victim whose ambulance is misdirected from the hospital to the maximum security prison where he is not only denied treatment but indefinitely confined under the most punitive of prison regimes. In such a situation the court must look to the actual conditions of confinement, not the hypothetical destination of the ambulance.

The availability of an as-applied challenge in like situations of confinement is well understood. Although the Supreme Court held in *Kansas v. Hendricks*, 521 U.S. 346, 371, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) that Kansas's involuntary commitment statute for sexually violent predators did not violate the due process, ex post facto, and double jeopardy clauses of the United States Constitution, the Court expressly recognized the possibility that a civil commitment statute such as RCW 71.09 could be *applied* in a punitive fashion and thus violate the double jeopardy clause. *See Young*, 176 F.3d at 1199 (citing *Hendricks*, 521 U.S. at 361-63), *amended* (Sept. 16, 1999). In fact the Supreme Court pointedly considered the argument regarding actual conditions of confinement when dismissing Hendricks's double jeopardy challenge:

> And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. Because none of the parties argues that people institutionalized under the Kansas general commitment statute are subject to punitive conditions, even though they may be involuntarily

> confined, it is difficult to conclude that persons confined under this Act are being "punished."

Hendricks, 521 U.S. at 363 (citation omitted); *see also Allen v. Illinois*, 478 U.S. 364, 373, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986) ("Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case."). If the reciprocal proposition is factually established, i.e., actual confinement under punitive conditions, the statute as applied to that individual imposes double jeopardy because it punishes once again for a crime previously prosecuted and a sentence already served. It is therefore not only appropriate but necessary for the court to examine the actual sanction *as applied* in a particular case to determine if double punishment is imposed contrary to the double jeopardy clause.[9]

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[9] *In re Personal Restraint of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993) also leaves open the door to an as-applied challenge: "Absent any indication that a criminal purpose was intended, *or actually served by the statute*, the stated civil goals of the Legislature are controlling." (citation omitted) (emphasis added). But because the record there did not contain evidence of the conditions of confinement, the court confined its analysis to the facial validity of the statute.

> There is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment. *These issues are not currently before the court*. Facially, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of the commitment.

Id. at 35 (emphasis added).

VI.

Equal Protection under State and Federal Constitutions is not Equal

Whether Turay has been deprived equal protection of the laws contrary to either the federal or state constitutions cannot be determined from the majority's conclusory and superficial analysis of the obvious differences between the state and federal constitutional clauses. The majority states, "a long line of Washington cases establishes that the two clauses have the same impact." Majority at 34. I disagree. Although in some situations neither constitution is violated, that is not to say these very different clauses have the same meaning.[10]

"[T]he extent to which the constitutional guaranties found in article I, section 12, exceed those available under the equal protection clause of the Fourteenth Amendment remains an open question." *Griffin v. Eller*, 130 Wn.2d 58, 65, 922 P.2d 788 (1996) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 642 & n.2, 771 P.2d 711, 780 P.2d 260 (1989); *State v. Smith*, 117 Wn.2d 263, 282-88, 814 P.2d 652 (1991) (Utter, J., concurring)); *see also Darrin v. Gould*, 85 Wn.2d

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[10] The Fourteenth Amendment to the United States Constitution states in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I, section 12 of the Washington State Constitution states: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

859, 868, 540 P.2d 882 (1975) ("Const. art. 1, § 12 may be construed to provide greater protection to individual rights than that provided by the equal protection clause.").[11] Justice Utter has eloquently explained the distinction between the federal and state equal protection clauses:

> We cannot ignore the plain difference in the language and history that exists between the federal equal protection clause and the privileges and immunities language of our own constitution. To do so is to rewrite our constitution without benefit of a constitutional convention and to deprive the people of this state of additional rights, which they adopted in our constitutional convention, without their consent.

Smith, 117 Wn.2d at 282 (Utter, J., concurring).

As we are not automatically compelled to conclude the two clauses are always identical in effect and because Turay has urged an independent *Gunwall*[12] analysis, I

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[11] Although the majority criticizes these sources as having "little precedential value," Majority at 35 n.25, the majority does not critically examine the difference in the language and the history that clearly separates the federal equal protection clause from the state privileges and immunities language but merely cites a "long line of cases" which uncritically assume the two clauses have the same impact. Moreover, to say the clauses have the "same" impact implies that when and if the Supreme Court changes its view of federal equal protection the state constitution must then assume a new meaning. This logic is specious. *Cf. In re Detention of Petersen*, 138 Wn.2d 70, 95-107, 980 P.2d 1204 (1999) (Sanders, J., dissenting).

[12] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986).

believe a separate analysis under the Washington privileges and immunities clause is necessary to properly address the question and object to the superficial treatment afforded this important state constitutional question by the majority.

VII.

Conclusion

Mr. Turay is unconstitutionally confined and I would release him. That such a result might not be welcome in all quarters is no reason to abandon the legal rights of this man – and we must be exceptionally firm in this resolve – for it is in just such unpopular circumstances that the courts must act from principle, not expediency, if they are to discharge their duty.

Should however this matter be retried, I would protect Turay's right to appeal and his Sixth Amendment right to represent himself; I would allow the introduction of evidence concerning the conditions of his confinement; and I would protect Turay's right to challenge testimony that he should lose his liberty simply because he has accessed, or attempted to access, the judicial system. I would redraft the jury instructions to make sure the reasonable doubt standard is preserved, not defeated by doubletalk. Finally I would refrain from weakening the state constitutional equal protection guarantees, the

heritage of every citizen of this state, which are expressed in a unique text very unlike its national counterpart.

/s/ Sanders, J.

MADSEN, J. (concurring in the dissent) – For the reasons stated in my concurrence in the dissent in *In re Detention of Elmer Campbell,* I also dissent from the majority in this case.

/s/ Madsen, J.

APPENDIX B

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of:	)	NO. 91-2-10539-1
Richard G. Turay,	)	ORDER OF
	)	COMMITMENT
Respondent.	)	(Filed Oct. 17, 1991)
	)	

Upon the verdict of the jury on September 20, 1991 that the respondent, Richard G. Turay, is a sexually violent predator pursuant to RCW 71.09.060, and the verdict having been duly filed on September 20, 1991 the court hereby enters the following:

ORDER OF COMMITMENT

The respondent, Richard G. Turay, is hereby committed to the Special Commitment Center in Monroe, Washington, to the custody of the Department of Social and Health Services, for control, care, and treatment until such time as respondent's mental abnormality or personality disorder has so changed that respondent is safe to be at large.

DONE IN OPEN COURT this 16th day of October, 1991.

/s/ Ricardo S. Martinez
JUDGE /s/ R.S. Martinez

Presented by:

/s/ Tim Blood
Attorney for Petitioner
State of Washington

Copy received; notice of
presentation waived:

_____

Attorney for Respondent

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF: RICHARD TURAY, Appellant, v. STATE OF WASHINGTON, Respondent.	No. 29466-1-I DIVISION ONE FILED: SEP 27 1993

PER CURIAM. Richard Turay appeals his Order of Commitment under RCW 71.09 as a sexually violent predator. Turay argues the order of commitment must be vacated and remanded for a new trial because the jury verdict was not unanimous.[1] The States concedes error.

The State's concession is well taken. In a recent case upholding the constitutionality of the civil commitment provisions of RCW 71.09, the Supreme Court held that the statute must be construed to afford an individual the right to a unanimous 12-person verdict. ***In re the Restraint of Young***, 122 Wn.2d 1, 47-8, ___ P.2d ___ (1993). Accordingly, the Order of Commitment is vacated and this case is remanded for a new trial.

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[1] Only five of the six jurors found that Turay satisfied the elements of the statute.

APPENDIX D

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of: RICHARD TURAY, Respondent.	NO. 91-2-10539-1 ORDER OF COMMITMENT

Upon the verdict of the jury on 11 October 1994, that (1) the respondent, Richard Turay, in a sexually violent predator, and (2) the best interests of respondent or others will not be served by less restrictive treatment which is an alternative to total confinement, and the verdict having been duly filed on 11 October 1994, the court hereby enters the following:

ORDER OF COMMITMENT

The respondent, Richard Turay, is hereby committed to total confinement with the Department of Social and Health Services in the Special Commitment Center in Monroe, Washington for control, care and treatment until such time as (1) respondent's mental abnormality and/or personality disorder has so changed that he is safe to be at large, or,

(2) the best interests of respondent or others will be served by less restrictive treatment which is an alternative to total confinement.

DONE IN OPEN COURT this 19th day of October, 1994.

/s/ Michael Spearman
THE HONORABLE
MICHAEL SPEARMAN

Presented by:

/s/ Michael Lang
Michael Lang, WSBA #91002
Attorney for Petitioner

Copy received:

/s/ Peter Avenia
Russell Leonard, WSBA #19922
Peter Avenia, WSBA #20799
Attorneys for Respondent

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

In re the Detention of: RICHARD GARRET TURAY, Respondent.	NO. 91-2-10539-1 FINDING OF FACT AND CONCLUSIONS OF LAW AND ORDER ON RESPONDENT'S MOTION TO DISMISS BASED ON UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT AT THE SPECIAL COMMITMENT CENTER (Filed April 4, 1995)

This matter came before the court on the 16th day of September, 1994 on respondent's Motion to Dismiss this action. Respondent argues that RCW 71.09 is unconstitutional as applied to him due to (a) the conditions of confinement and (b) inadequate treatment made available to him at the special commitment center. Respondent further asserts that the State is collateral [sic] estopped from asserting in this proceeding that the treatment available to respondent at the special commitment center is constitutionally adequate by reason of the jury verdict in *Richard Garret Turay v. David B. Weston, et al,* Cause No. C91-664WD, heard in United States District Court for the Western District of Washington before the Hon. William Dwyer.

The State of Washington appeared through Deputy Prosecuting Attorney Michael Lang. Respondent, having waived his appearance, appeared through his attorneys Peter Avenia and Russell Leonard. In accordance with its earlier ruling, the court adopted the 18 volume factual record generated in a similar hearing on a motion to dismiss *In re the Detention of Andre B. Young,* King County cause No. 90-2-21319-6, heard before the Hon. Harriett Cody of this court from November 16 to December 15, 1993. The parties supplemented this record with testimony of witnesses, exhibits, legal briefs and memoranda, the ruling entered by United States District Court Judge William Dwyer in *Turay v. Weston,* et. al, supra, and evidence presented before the Hon. Sharon Armstrong, a judge of this court, in similar hearings on motions to dismiss *In Re the Detention of Randy C. Pedersen,* King County Cause No. 93-2-09933-9 and *In re the Detention of Elmer Cambell,* King County Cause No. 93-2-15348-1; the declarations of William Dehmer, Dr. George Nelson, Debra Aker, David Weston, Joseph Aqui, Gilberto Soliz, Elmer Cambell, the video taped testimony of David Weston, Debra Aker, Dr. George Nelson, William Dehmer, Curtis Beard, Dawn James, Gilberto Soliz, Robert Burbank, and oral arguments of counsel all of which have been considered by the Court.

The Court first concludes that the State is collaterally estopped from relitigating the constitutional adequacy of the treatment available to respondent at the SCC by reason of the jury verdict rendered to *Turay v. Weston,* et. al United States District Court Cause No. C91-664WD in that:

a. The issue presented in *Turay v. Weston*, et. al is identical to that presented here, i.e., whether respondent has been deprived of his constitutional rights in regards to access to mental health treatment.

b. It is not disputed that the Federal District Court decision is a final judgment on the merits.

c. Identity of parties is present in the instant case. The petitioner in this matter is the State of Washington, the defendants in *Turay v. Weston*, et. al are employees of the State of Washington acting pursuant to statutory authority and acting within the bounds of that authority. In both matters the State Attorney General's office entered notices of appearance on behalf of the respective petitioner and defendant. The fact that the State of Washington was not named specifically as the defendant in the federal case is a superficial and insubstantial distinction in view of the issue determined, i.e., whether respondent is being denied his constitutional rights to adequate treatment. On this question, no issues have been identified which would distinguish the State's interest as petitioner in this matter, from that of the state employee defendants in the federal case.

d. The application of the doctrine of collateral estoppel in these circumstances would not work an injustice.

The Court further makes the following:

FINDINGS OF FACT

1. Respondent is detained at the special commitment center (SCC) as an adjudged sexually violent predator (SVP) and RCW 71.09.

2. SCC is operated by the Department of Social and Health Services, but housed entirely within the Special Offender Center (SOC), a Department of Corrections' prison facility in Monroe, Washington. The SOC building also houses, in separate units, mentally ill prisoners undergoing temporary treatment, and developmentally disabled prisoners.

3. The SCC facility was designed as a prison prior to the existence of the SCC. The SCC is operated by DSHS with DOC by written interagency agreement. Sharing a physical facility with the DOC under the terms of the interagency agreement requires SCC compliance with a number of DOC prison rules and regulations, some contact between SCC residents and DOC inmates, and independent of the SCC on DOC for many services necessary to the operation of the SCC, included but not limited to shared use of the SOC law library and visiting rooms, DOC medical services, and the use of DOC meal services. SCC residents' lives, like DOC inmates' lives, are affected by the SOC facility design, services and administrative policies.

4. The SCC uses resident monitoring equipment (for example video and audio monitoring in all program rooms and audio monitoring in all residents' rooms) which was installed in the facility by DOC for DOC use in a prison facility. SCC residents are frequently and may at

any time be monitored by SCC staff through use of such equipment, without the residents' knowledge.

5. Space limitations and some elements of facility design at SCC are more restrictive for residents than for prison inmates in DOC facilities which are specifically designed for mentally ill offenders. The austerity and small size of the SCC facility adds to the sense of physical oppressiveness.

6. The SCC is rated close to medium in terms of the facility's external (perimeter) security. SCC's internal security is provided by DSHS with back-up emergency services from DOC. SCC has called DOC staff for a "show of force" against SV residents at least a half a dozen times. SCC's entry security as well as its perimeter security is provided by DOC. Some residents, like DOC inmates, who may attempt to escape from a yard facility may be shot by DOC guards pursuant to a legal opinion provided by the Washington State Attorney General. SCC residents who have not yet been committed are not permitted to use the large yard.

7. SCC implemented a three level resident security classification system for residents in July of 1994. The level system restricts access of some residents to the microwave oven, refrigerator, outdoor silo, weight room, and recreational equipment as well as personal hygiene items. Although the classifications system purports to measure the inmates' security risk, it includes irrelevant factors such as an inmate's commitment to the treatment program and participation in group activities. Because the classification includes factors unrelated to security, it lacks security rationale. Similarly because it does not

relate to or promote treatment goals it lacks treatment rationale. The criteria for placement in the basic and intermediate levels are vague. Residents could be and have been placed on different levels for the same behavior. Classification under the level system in therefore arbitrary.

8. Each SCC resident has its own personal sleeping and bathroom space, while most DOC inmates share such space with other inmates.

9. Precommitment and postcommitment detainees are housed together despite recommendations by all treatment experts who testified at the *Young* hearing that segregating these two groups of residents would further the treatment goals of the program. (Dr. Quinsey, in his written evaluation, was of the same opinion.)

10. Residents undergoing treatment as well as those choosing not to participate in treatment are housed together, despite recommendations by all treatment experts who testified in the *Young* hearing that segregating these two groups of residents would significantly further the treatment goals of the program. (Again Dr. Quinsey in his written evaluation shared this opinion.)

11. All SCC residents are subjected to stringent security procedures even though not all of the offenders present such security risks. Residents are observed when they go to the bathroom, sometimes by female staff. Residents are strip-searched without reasonable suspicion any time they leave and return to the SOC-SCC facility, even for medical appointments and even though they are under constant armed surveillance while gone. At least twice, residents have had their clothes torn off for refusing to

cooperate with a strip-search. They are patted down whenever they use the "large yard", after every visit and whenever they leave the unit for some other part of the building. No contraband or weapons have ever been found in any such strip-search since the opening of the facility. Residents are shackled and handcuffed any time they leave the facility, even though they are under constant armed guard. Residents are chained when they are transported to the courts. While SCC administration asserts that residents' rooms are searched only on reasonable suspicion, on at least one occasion all residents' rooms were searched upon discovery that a staff member's keys were missing. There was no reason to suspect that any of the residents had stolen them. No keys were found.

12. Strip-searches of SCC residents were inducted by SCC forensic therapists and other unit staff even though it is undisputed that use of residents' respective therapists to conduct such strip-searches is incompatible with the treatment goals of the program because such practices can be harmful to establishing and maintaining a therapeutic relationship based on trust. The practice of including an individual resident's assigned therapist in strip-searches of that resident was terminated on December 6, 1993, when the SCC superintendent first learned, as a result of the testimony in the *Young* hearing, that such a practice is inconsistent with the treatment goals of the program.

13. Formal grievance procedures are in place at other DOC facilities, which include but are not limited to providing prisoners with notice and definitions of infractionable offenses and the consequences for violations thereof,

and the opportunity for a prompt hearing on any alleged infraction. The SCC has no such formal grievance procedure for its residents. As a result there has been arbitrary and inconsistent enforcement of rules of the unit. Dr. Nancy Steele, an expert in custodial treatment of such offenders, testified that inconsistent enforcement of rules is cruel.

14. Inmates in the DOC Twin Rivers treatment program for sex offenders and in some other DOC programs have access to private conjugal visits with their spouses and other family members. There has been no policy in place at the SCC since its commencement in 1990 defining the circumstances under which a resident may become eligible for such conjugal visits as part of his individual treatment program, despite the testimony of treatment experts (including consultants to the SCC as well as independent experts) that such conjugal and family visits may significantly enhance such individual sex offenders program. Conjugal and extended family visits have not been permitted at SCC. There is no evidence that SCC residents have engaged in inappropriate behavior during conjugal visits while at DOC.

15. No transition, work release or after care programs have been designed or implemented at the SCC despite the opinion of SCC consultant Dr. Vernon Quinsey in 1992 that the lack of any provision for after care and community supervision is "a fatal problem with the special commitment program as it now stands". All treatment experts (including consultants to the SCC as well as independent experts) agreed that gradually reduced supervision and well defined [sic] well-defined conditions of eligibility for release from detention and an after

care program are a fundamental and necessary component to any treatment program for this population.

16. The regulations for the SCC in WAC 275-175-050 do not as a whole, provide a wider range of privileges for residents at the SCC than those to which DOC prison inmates are entitled, either in policy or practice. Access for a limited number of the SVPs in the SCC to personal use of a microwave oven, a refrigerator, video games and personal purchases of pizza and other grocery items outside the facility for consumption at the SCC do not, in and of themselves, sufficiently distinguish the privileges available to residents of the SCC from those of [sic] available to prison inmates. In many respects, the privileges and opportunities for residents at the SCC are less than those to which residents were entitled in DOC prison facilities (for example, limited law library access, shorter visiting hours, fewer vocational, educational and recreational opportunities).

17. The cognitive behavioral treatment program designed for adjudged SVPs at the SCC has five components: (1) assessment and evaluation; (2) psycho therapy (group and individual); (3) psycho-educational modules; (4) assessment and modification of sexual arousal; (5) a treatment milieu intended to encompass all aspects of the resident's environment in the facility.

18. The SCC treatment program design was created in consultation with a number of treatment experts, including those experienced in the treatment of prisoners who are subject to determinate sentences in prison facilities (specifically, the Twin Rivers program in the DOC and the Atascadero Corrections program in California), as well

those experienced in the treatment of sex offenders who qualify for supervised outpatient treatment in the community.

19. None of the experts consulted by DSHS in the design of the treatment program at SCC had experience in either the design or actual treatment of adjudged SVPs subject to civil commitment of indeterminate duration in secure facilities like the SCC.

20. Key elements of the treatment programs designed and in effect at both the DOC Twin Rivers facility and the Atascadero Prison in California (used as a model for the SCC) are not included in the design of the SCC treatment program, for example, core relapse prevention groups led by either a clinical psychologist or a psychiatric social worker, use of highly structured treatment manuals for all components of treatment, required attendance in therapy groups in psycho social modules, significant employment opportunities, couples and family therapy, twelve step groups, mandatory prerelease classes and after care programs.

21. While all five components of the SCC treatment program design are theoretically in place and available to residents, only parts of the SCC treatment program have been fully implemented or are fully functioning at this time. For example, the only group therapy which has occurred took place for approximately one year or less in 1992 to 1993, met for a maximum of three hours per week, involved five residents at most, was led by one forensic therapist who was not a psychiatrist, psychologist, psychiatric social worker or registered nurse or a certified sex offender treatment provider, and was canceled by

staff because of the inability of the leader to manage the dynamics of the group. A third group was reinstituted after the *Young* hearing, but the leader, a licensed psychologist, is not a certified sex offender treatment provider. Few of the psycho-educational models have been offered and the arousal reconditioning has only recently begun for four residents.

22. The consensus of all mental health experts testifying in the *Young* hearing is that intensive group therapy is the most critical component of the successful sex offender treatment program. In group therapy is asserted by SCC staff to be the primary treatment modality at SCC. Yet a number of residents, including committed residents, have been denied admission to the therapy group and have been admitted only into pre-group, which does not address sex offense treatment issues. At least one committed resident has been denied admission to the group on the grounds that he has not proved his good faith interest in treatment. Residents are allowed into group therapy only after complete assessments. According to expert testimony at the *Young* hearing this policy is punitive and counterproductive. The same expert criticized SCC's policy of only admitting residents who had admitted their crimes into group therapy.

23. There are no state certified sex offender treatment providers on the SCC staff. The only staff member with sufficient expertise to become certified is the superintendent, who is not directly involved in treatment, whose office is in a trailer outside the facility, and who spends less than three hours per week on the unit. The program director had no training or experience in sexual deviancy treatment before being hired by the SCC in 1990. While

there is a part time psychiatrist available, he prescribes medicine for a few residents, assists in psychiatric assessments, and participates in treatment team meetings. He is not otherwise involved in sex offender treatment. Until very recently the only staff psychologist at SCC was unlicensed and had no experience working with sex offenders when she was hired. She spends approximately 70% of her time preparing evaluations. SCC had recently hired a second staff psychologist, who co-leads the core treatment group. A neuropsychologist provides neuropsychological evaluations and treatment recommendations less than two hours per month. These treatment providers are available for staff consultation but do not provide treatment. The forensic therapist hired in February, 1994 to provide direct treatment has recently left the program in August, 1994.

24. The staff members most directly involved in the treatment milieu and management of residents are employees classified as forensic therapists (FTs), and psychiatric security attendants (PSAs), whose relevant experience consists largely of work in DOC prison institutions. The FTs have primary responsibility for providing individual therapy to residents, yet none of them are psychologists, psychiatrists, psychiatric social workers or nurses. They are not provided with a treatment manual, indeed none exists. The treatment responsibilities of the PSAs are not clearly defined. The PSAs are untrained in sex offender treatment, yet are charged with the responsibility of deciding which sexually explicit materials may be given to SVPs, a judgment which is critical in the residents' deviancy treatment.

25. SCC staff attributes the incomplete implementation of the treatment program design to most residents' choice not to participate in some or all of the program. For a variety of reasons cited by residents, which include but are not limited to the following: lack of confidentiality of all individual in-group therapy (evidence of all such participation can and must be provided to the court, notwithstanding WAC 275-155 which provides for resident's right to remain silent until 1993), lack of interest in various aspects of the treatment program, lack of confidence in treatment staff experience and skills, advice of legal counsel, infrequency and unavailability of psycho-social educational modules and therapy groups, lack of incentives and hope because of a perceived absence of a relationship between participation in treatment and release from commitment, absence of an after care or transition program, staff inconsistency in applying criteria for participation in various aspects of the program and resistance to treatment.

26. SCC staff believe that the fundamental reason that most committed SVPs are not engaged in aspects of treatment is because they all believe it would disadvantage them, from a legal perspective in their quest for release. This belief on the part of the staff has played a role in the incomplete implementation of the treatment program design. Other reasons which have contributed to the incomplete implementation of the treatment program by DSHS also include but are not limited to the small size of start-up programs, limited resources, limited number of treatment staff qualified to teach certain psycho-social educational modules, staff inexperience in leading group therapy, staff inexperience in completing sexual deviancy

evaluations, staff deference to the initiation of treatment by committed residents and competing administrative demands on professional staff.

27. There are currently more treatment opportunities and programs in place for convicted sex offenders in the DOC Twin Rivers prison population than there are in the DSHS facility at SCC for civilly committed SVPs.

28. Opportunities for resident employment, structured leisure activities, and education are less at the SCC than at either the DOC Twin Rivers facility or the Atascadero prison facility, whose prison treatment programs were the models for the design of the SCC treatment program, or at other DOC facilities. DSHS staff indicated that the small size of the SCC as a start up program, budgetary constraints, a space limitation in the existing facility have been administrative constraints on establishing such programs and opportunities for residents who are civilly committed to the SCC for indeterminate terms. Recently more employment opportunities have been provided.

29. SCC staff have verbally abused residents, making derisive comments about residents' status or race. On one occasion, a PSA mocked Native American religious practices in front of a Native American resident. Staff have laughed during strip searches of residents. Such derogatory and racist comments and behavior are inconsistent with the treatment focus of the SCC. In addition, residents have observed staff sleeping on duty and reporting to work flushed as though under the influence of controlled substances. Staff have requested a resident to harm other staff and have provided pornography to residents. Some residents are fearful of staff retaliation if

they complain about this conduct. Such staff conduct is inconsistent with a treatment milieu.

30. The inadequacies of the treatment program and lack of work release or after care program contributes to the belief of respondent and other inmates that the commitment to the SCC constitutes a life sentence.

Based on the foregoing Findings of Fact the court makes the following:

CONCLUSIONS OF LAW

1. The burden of proof for purposes of this motion was on the respondent to prove by a preponderance of the evidence that the actual conditions of his confinement and the actual nature and quality of treatment available to him at the SCC pursuant to RCW 71.09 violates his substantive due process rights.

2. The respondent has been unable to sustain his burden on proving that his detention at the SCC facility, which is both physically located within and physically designed for a department of corrections prison facility, violates his substantive due process rights.

3. Respondent has been unable to sustain his burden of proof that the stringent security procedures at SCC are excessive as to him and violates his substantive due process rights.

4. Respondent has been unable to sustain his burden of proving that the application of many DOC institutional rules, regulations and restrictions to the SCC facility

(either pursuant to the DOC SCC joint operating agreement or SCC administrative decisions) violates his substantive due process rights.

5. Respondent has proven the following aspects of the SCC program violates his substantive due process rights:

a. The failure to clearly define and give notice of rules of conduct and behavior subject to infraction.

b. The lack of grievance procedures for inmate conduct violations.

c. The use of level classification system which reflects neither security considerations nor treatment considerations and which standards and criteria are only vaguely defined and thus permit arbitrary classification in treatment of residents.

d. Inadequacies in the treatment program consisting of the following:

1. Lack of sufficient staff, trained, experienced and certified in treatment of sex offenders.

2. Lack of comprehensive treatment program which includes timely deviancy evaluations, highly structured treatment manuals, adequate scheduling of pregroup, core group and psycho educational modules, significant employment opportunities within the facility, involvement of family members in treatment, and the conditional release of after care program.

3. Lack of individual treatment plans which include objective bench marks of

improvement so as to document, measure and grade an individual's progress in therapy.

4. Lack of training and supervision of staff, resulting in verbal abuse of residents, lack of trust and rapport with residents and staff and a milieu counter productive to treatment.

6. Petitioner is directed to report to the Court within 30 days of the date of this order as to the status of the conditions found to be in violation of Respondent's constitutional rights as set forth in this order and in the order of Judge William Dwyer in United States District Court Cause No. C91-664WD. If the conditions noted have not been shown to have been remedied, the Court will entertain a motion for the conditional release of the Respondent.

DONE THIS 30TH day of March, 1995

/s/ Michael S. Spearman
MICHAEL S. SPEARMAN, JUDGE
KING COUNTY SUPERIOR COURT

APPENDIX F

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In Re the Detention of, RICHARD TURAY Respondent	NO. 91-2-10539-1 ORDER DENYING MOTIONS FOR RECONSIDERATION AND TO DISMISS

The Respondent, Richard Garrett Turay, brings these motions to dismiss this proceeding against him and for his unconditional release based on the alleged unconstitutionality of RCW 71.09.090 and on the grounds that the conditions of his current confinement are punitive and he is thus subject to multiple punishments for the same offense, in violation of the constitutional prohibition against double jeopardy. The court has considered all of the memoranda and supporting documents filed by the parties in support of, and in opposition to, the motions. For reasons set forth below, the Court upholds the constitutionality of RCW 71.09.090, as it is construed in this decision and denies the motion for immediate conditional release, on double jeopardy grounds.

THE CONSTITUTIONALITY OF RCW 71.09.090

Respondent challenges the constitutionality of RCW 71.09.090 on the grounds that it violates the equal protection clause of both the state and United States constitutions because its release provisions lack the procedural protections contained in RCW 71.05, the Involuntary

Treatment Act.[1] Respondent further asserts that the statute is constitutionally infirm because it causes him to be detained without the due process of law required by both the state and federal constitutions. Specifically, respondent claims that the statute permits the state to continue his detention without requiring it to prove that he is currently mentally ill and dangerous.

The state does not dispute that the release procedures are different for those committed pursuant to RCW 71.05 and those committed under RCW 71.09. It justifies this distinction however, by pointing to the legislative finding that the treatment needs of these two groups, especially in terms of its duration, are quite different. Thus, the state argues, that persons committed pursuant to RCW 71.09, for whom very long term treatment is generally required are not similarly situated to persons committed pursuant to RCW 71.05, for whom the legislature envisioned a generally more short term treatment process. Because the two groups may be legitimately distinguished on this basis, the state argues, the release procedures for each need not be identical. Moreover, the state asserts that this distinction does not implicate due process concerns because, unlike the RCW 71.05 initial commitment process, under RCW 71.09 a full panoply of due process

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[1] Respondent argues that the Privileges and Immunities Clause of the Washington State Constitution, Article 1, Section 12, may be read more broadly then equal protection clause of the 14th Amendment to the United States Constitution. However, a long line of cases have held, or at minimum strongly implied, that the two clauses are co-extensive. *Texas v. Cohn*, 8 Wn. 2d 360 (1941); *Olsen v. Delmore*, 48 Wn. 2d 545 (1956); *Housing Authority v. Saylors*, 87 Wn. 2d 732 (1976).

rights are afforded to the respondent prior to the fact finders' decision to commit, including proof beyond a reasonable doubt that the respondent currently suffers from a mental illness and is dangerous. Thus requiring respondent to shoulder the burden of raising an issue of fact as to a change in his condition before the state must undertake the rigorous process of attempting to recommit him does not violate his due process rights.

Differing Commitment Intervals

The Fourteenth Amendment of the U.S. Constitution and Article 1, Section 12 of our state constitution require that persons similarly situated with respect to legitimate purposes of the laws receive like treatment. *In re Knapp*, 102 Wn.2d 466 (1984). Both the state and federal Supreme Courts have held that for purposes of equal protection analysis persons civilly committed under different statutory schemes are similarly situated. *In re the Detention of Young*, 122 Wn.2d 1 (1993); *In re Knapp*, supra; *Heller v. Doe*, ___ U.S. ___, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993); *Humphrey v. Cady*, 405 U.S. 504 (1972). Thus the protections afforded in the release provisions for those committed pursuant to RCW 71.09 must be considered in light of the protections afforded to persons committed under RCW 71.05. Moreover, since the distinctions involve a deprivation of physical liberty, an intermediate or heigthened level of scrutiny should be applied. Any substantial differences between the two statutes must be shown to be substantially related to the achievement of important governmental objectives. *Hickey v. Morriss*, 722 F.2d 543 (1983); *State v. Phelan*, 100 Wn.2d 508 (1983).

The *Young* Court found that the objectives of RCW 71.09 were the incapacitation and treatment of violent offenders. The Court also noted that there were distinctions between the release provisions of the two statutes.[2] Those committed under RCW 71.05 face a maximum commitment period of 180 day intervals. At the expiration of each period, the detainee is entitled to a full range of procedural protections including a jury trial with the burden of proof upon the state. See RCW 71.05.310, .320. However, under RCW 71.09 the confinement interval is one year and, unless DSHS concurs in the petition for release, the detainee bears the initial burden of showing probable cause to believe that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. Only if the detainee satisfies this initial burden is he or she entitled to a jury trial in which the state is required to prove beyond a reasonable doubt that the detainee's mental abnormality or personality disorder remains such that he or she is not safe to be at large and that if conditionally released to a less restrictive alternative or unconditionally discharged is likely to engage in predatory acts of sexual violence. See RCW 71.09.090.

As noted above, the *Young* Court found that the objectives of RCW 71.09 were incapacitation and treatment of violent offenders. However, *Young* also made perfectly clear that dangerousness is only a reasonable

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[2] The *Young* Court recognized the differences in the release procedures of RCW 71.05 and RCW 71.09 before the latter was amended in 1995. (See *Young* at 43, fn. 13.) In this decision the court considers only the amended version of RCW 71.09.

basis for distinctions in "the type of *custodial or medical care* to be given, but it has *no relevance whatever* in the context of the opportunity to show whether a person is mentally ill *at all.*" *Young*, at 45, quoting *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) (emphasis in original). Thus, if the disparate treatment in the release procedures of the two statutes is justifiable it must be on the basis of the state's interest in the treatment of violent offenders.

The state argues that the difference in the length of the commitment period intervals is based on the legislative finding that the prognosis for curing sexually violent predators is generally poor and that the treatment needs for this group are very long term. (See RCW 71.09.010) However, the *Young* Court noted, when it found that sex predators could not be deprived of the opportunity to be considered for less restrictive alternatives to confinement, that not all sex predators present the same level of danger, nor do they require identical treatment conditions. *Young* at 47. Moreover, the need for long term treatment is not a meaningful distinction between persons committed pursuant to RCW 71.05 and those committed pursuant to RCW 71.09 since either statutory scheme may include persons in need of short or long term treatment and persons whose condition may or may not cause them to be a danger to themselves and others. *Detention of Pugh*, 68 Wn. App. 687, 693.

As the *Young* Court made clear, the state may not provide different procedural protections for those confined pursuant to the sexual predator statute unless there is a valid reason for doing so. *Id.* at 47. Nor may the state deprive a person of procedural protections afforded other individuals merely because the state makes the decision

to seek commitment under one statute rather than another. *Humphrey v. Cady*, 405 U.S. 504, 512 (1972); *Young* at 45. Thus, while the state has a substantial interest in providing long term treatment for some violent sex offenders, RCW 71.09.090 is not drawn so as to reach only those persons in need of long-term treatment. Instead, it swallows up all those committed pursuant to the statute and deprives even those not in need of long-term treatment, of a procedural protection available to those committed pursuant to RCW 71.05. This, the sate may not do. Equal protection requires the state to comply with RCW 71.05 as it relates to the commitment interval period of 180 days.

Shifting the Burden of Proof

As noted above, the procedures applicable upon the expiration of the commitment interval in RCW 71.09 require the detainee to bear the initial burden of showing probable cause to believe that he or she is safe to be released. In making this showing the detainee is entitled to the assistance of counsel and a qualified expert or professional person and upon request, either or both may be appointed on his or her behalf. Upon satisfying this initial burden, the detainee is entitled to a full blown jury trial along with the identical procedural protections which accompanied the initial commitment proceeding. In contrast, under RCW 71.05, the committed person bears no burden of establishing that he or she is entitled to jury trial at the expiration of each commitment period. Instead, the committed person is automatically entitled to a jury trial at which the state at all times bears the burden

of proving that the committed person is currently mentally ill and dangerous.

In support of this distinction the state asserts that the two groups are not similarly situated in that the procedural protections at the initial commitment proceeding under RCW 71.09 exceed, in significant ways, those contained in RCW 71.05. The burden of proof, for example, is of the highest order, beyond a reasonable doubt versus clear and convincing evidence, the jury must be unanimous versus 5 of 6 or 10 of 12 and the trial itself can last for a number of weeks versus a matter of hours. Thus, those committed under RCW 71.09, are less likely, on the whole, to have been committed erroneously as compared to those committed under RCW 71.05. Accordingly, the state argues, the distinction in the release procedures under each statute as to who bears the initial burden of proof is appropriate.

The court finds that the heightened protections contained in the initial commitment procedures for persons committed pursuant to RCW 71.09 significantly differentiates them from those committed under RCW 71.05. Accordingly, it is not a violation of equal protection that the release procedures under each statute are not identical. Moreover, given the resources that are expended at the initial commitment trial, it is reasonable to require that there be some sort of preliminary hearing to determine whether there are issues for trial instead of automatically compelling the state to undertake the expense of another full blown jury trial based solely upon the mere passage of time.

RCW 71.09.90 provides for such a preliminary hearing to be held annually. (Obviously, pursuant to this decision the hearing shall become a semi-annual event with regard to respondent.) It states, in pertinent part:

> . . . the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally released.

At the hearing, the court is to determine whether "probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged." The statute does not clearly describe which party bears the burden of demonstrating the requisite change at this hearing, however, in the context in which this hearing occurs, it is apparent that only respondent will have an interest in shouldering this burden. To the extent that the burden of proof is placed upon the respondent, the statute violates his due process rights as guaranteed by the state and federal constitutions. *Foucha v. Louisiana*, 504 U.S. 71 (1992) leaves little doubt that the burden of proof must remain on the state to establish that the respondent is currently mentally ill and dangerous. A shifting of the burden to respondent, however slight, is impermissible. (See also Young, *supra* at 38.)

Accordingly, at the semi-annual review hearing the burden is on the state to show that the respondent is

currently suffering from a mental abnormality or personality disorder which makes the respondent likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged. If the state makes this showing and it is not rebutted by the respondent then there is no need for a trial and the respondent remains in custody.

However, if the showing is not made, or if the respondent raises a material issue of fact, then a trial is necessary. It is not necessary that the respondent show probable cause to believe that he is safe to be conditionally released or unconditionally discharged. He only needs to raise material deficiencies in the state's report which would indicate that the report does not make the affirmative showing that he still suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged. Alternatively, respondent may come forward with evidence, independent of the state's report, which raises a material issue of fact as to the state's showing.

In the instant matter the report submitted by the state is insufficient. First, the report dated September 20, 1995, upon which the state relies is neither sworn nor in the form of a declaration and thus, is of no evidentiary value. Second, only the titles, but not the qualifications, of the report's authorities are provided, so the court is unable to assess the weight which should attach to the opinions expressed by the authors. Third, the report does not provide a current diagnosis of respondent's mental status other than to state, in conclusory fashion, that "[t]he

dysfunctional attitudes and behaviors promoting his sexual deviance persist and serious risk factors for repeating sexually violent and predatory offenses remain." This is insufficient. Similarly, the explanation of respondent's inappropriateness for conditional release to a less restrictive alternative is conclusory and insufficient.

The state has 30 days from the date of this order to present a semi-annual report in compliance with this decision.

DOUBLE JEOPARDY

To prevail on his double jeopardy claim, respondent must show that he is being punished twice for the same offense. *United States v. Halper*, 490 U.S. 435; *State v. Clark*, 124 Wn. 2d 90. In the instant case it is undisputed that respondent was previously punished in a separate criminal proceeding for the crime of rape and that his current detention as a sexually violent predator is based, in part, on these prior convictions. If the actual conditions of his current detention may reasonably be viewed as punishment, as opposed to confinement for treatment purposes, it follows that it is in violation of the constitutional protection against multiple punishments. *Halper*, supra.[3]

In his effort to establish that the actual conditions of his confinement are punitive, respondent presents evidence, the specifics of which are disputed by the state, of

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[3] The *Young* Court held that RCW 71.05 does not on its face violate the double jeopardy clause. *Young*, at 18. It did not address the issue of whether the statute, as applied, violates double jeopardy. That is the issue respondent raises here.

events occurring at SCC between July and September 1995. However, this issue is substantially similar to respondent's earlier claim that the security procedures at SCC are excessive and violate his substantive due process rights. The court adheres to its March 30, 1995 ruling denying respondent's claim on this ground and is not inclined to revisit the issue.

Respondent also relies upon one instance in which he was apparently assaulted, while at SCC, by person or persons unknown. The court is unable to draw any inferences from this unsolved incident that would lead it to conclude that confinement at SCC is punishment as opposed to treatment.

Of greater concern, is whether it may be said that SCC is providing respondent with adequate opportunities for mental health treatment consistent with the court's order of March 30, 1995 and the order dated June 3, 1994 in *Turay v. Weston, et al.*, No. C91-664WD. In the order dated March 30, 1995, this court identified four general areas in which the treatment program at SCC was constitutionally inadequate. In her seventh report to Judge William Dwyer, dated January 29, 1996, Dr. Janet Marques, in large part, addressed each of these areas.

1. Lack of sufficient staff, trained, experienced and certified in treatment of sex offenders.

> Dr. Marques notes that a comprehensive staff training program is in place and that the minimum competencies for the various staff classifications have been specified and, for the most part, have been met.

2. Lack of comprehensive treatment program which includes timely deviancy evaluations, highly structured treatment manuals, adequate scheduling of pregroup, core group and psycho educational modules, significant employment opportunities within the facility, involvement of family members in treatment and the conditional release or after care program.

> Dr. Marques concludes that the SCC program has developed a wide range of treatment components that address the most common treatment needs for sex offenders. Treatment evaluations have been completed for members of the two Core Therapy Groups, couples/significant others counseling is in place, plans are underway for a separate building in which extended family and conjugal visits will take place, a Community Transition Class is scheduled to begin this spring, along with a Victim Empathy/Awareness class, Alcoholics Anonymous meetings are available and a Sexual Addicts Anonymous is being organized. Relapse Prevention training is also available to the residents.

3. Lack of individualized treatment plans which include objective bench marks of improvement so as to document, measure and grade an individual's progress in therapy.

> Dr. Marques notes that individualized treatment plans have been completed for members of the two Core Therapy Groups.

4. Lack of training and supervision of staff resulting in verbal abuse of residents, lack of trust and rapport

with residents and staff and a milieu counter productive to treatment.

> In addition to the staff training discussed above, Dr. Marques notes that a Staff-Resident Team has been formed and met 11 times in November and December, 1995. The group successfully agreed upon 11 specific recommendations for improving trust and rapport among all individuals working or living at SCC. In addition, a centralized, interdisciplinary team has been formed to handle the unit's clinical and management decisions, including security classification levels and behavior management plans. Dr. Marques notes a number of positive changes as a result of the team's efforts.

Dr. Marques also describes in her report a number of areas in which the SCC treatment programs are deficient. In particular, a number of administrative positions remain unfilled or are staffed by interim personnel. For example, the direct care supervisory positions have not been filled, Dr. Allen Traywick, has filled the Program Director position only on an interim, half-time basis and the schedule of the new program psychiatrist may prove inadequate to meet the needs of all the residents. It should also be noted that the number of hobby/vocational activities has not been significantly expanded, although not for lack of effort. Dr. Marques also cited evidence that morale among the many SCC residents remains low and the level of suspicion and mistrust between some residents and staff is high.

The court must recognize, however, that at no time will the relations between staff and residents in an institution such as this be harmonious and without conflict.

The residents are detained against their will and resentment and frustration are a natural result of this detention. Thus, the nature of the relations between residents and staff cannot be the sole focus when determining whether the adequacy of the treatment provided meets constitutional requirements. The court must look at the record as a whole and determine whether the constitutional deficiencies cited in this court's order of March 30, 1995 have been addressed. While the treatment made available to the residents of SCC is not optimal, it is, on the whole, sufficient to meet constitutional requirements at this time. Accordingly, respondent's current confinement is not a second punishment for his previous offenses and his motion for release on double jeopardy grounds is denied.

The court's decision is not inconsistent with the April 2, 1996 decision in *Turay v. Weston, et al.*, in which Judge Dwyer denied respondent's motion to hold defendants in that case in contempt for failing to fully comply with the terms of the injunction. Judge Dwyer made no finding in his April 2 order that the treatment available at SCC did or did not meet constitutional requirements. He merely found that while progress had been made in all areas toward compliance with the injunction, more remains to be done to achieve full compliance. Today, this court has found no more and no less.[4]

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[4] Should Judge Dwyer subsequently find that the treatment available at SCC falls below constitutional requirements or if it appears that the state is no longer taking all reasonable steps towards achieving SCC's identified treatment program goals, the court's finding of constitutional adequacy may be subject to reconsideration.

Done this 8th day of May, 1996.

/s/ MICHAEL S. SPEARMAN
Judge Michael S. Spearman

APPENDIX G

THE SUPREME COURT OF WASHINGTON

No. 64100-5

IN THE MATTER OF THE DETENTION OF RICHARD GARRETT TURAY, Appellant.

ORDER CHANGING OPINION

(Filed Dec. 22, 1999)

It is hereby ordered that the typewritten opinion of the Court filed in the above cause on October 21, 1999 be changed as follows:

1. Footnote reference number[21] in the sixth line from the top of page 31 and footnote 21 at the bottom of pages 31 and 32 are deleted. Subsequent footnotes are renumbered accordingly.

2. In the tenth line from the bottom of page 36, the sentence beginning with the words "Turay was" is deleted.

3. In the tenth line from the bottom of page 36, the word "The" is deleted and the words "We note that the" are inserted in its place.

4. In the ninth line from the bottom of page 36, the word "his" is deleted and the word "Turay's" is inserted in its place.

Dated this 22nd day of December, 1999.

/s/ Guy, C. J.
Chief Justice

APPROVED:

/s/ Smith, J.
/s/ Johnson J
/s/ Madsen, J.
/s/ Alexander, J.
/s/ Talmadge, J.
/s/ Sanders, J
/s/ Dolliver, J.P.T.

THE SUPREME COURT OF WASHINGTON

In re the Detention of RICHARD GARRETT TURAY, Appellant.	)	NO. 64100-5 **ORDER ON MOTIONS FOR RECONSIDERATION**

(Filed Dec. 22, 1999)

The Court having considered the State and Appellant's motions for reconsideration and the Appellant's Addendum to Motion for Reconsideration and an Order Changing Opinion having been entered in the above cause on December 22, 1999.

Now, therefore, it is hereby

ORDERED:

That the State's motion for reconsideration is denied. The Appellant's motion for reconsideration is granted, insofar as to the removal of certain language from the opinion. Appellant's Addendum to Motion for Reconsideration is denied as there are no provisions in the

Rules of Appellate Procedure that authorize the filing of an addendum. Further reconsideration is denied.

DATED at Olympia, Washington this 22nd day of December, 1999.

/s/ Richard P. Guy
CHIEF JUSTICE

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. DAVID B. WESTON, et al., Defendants.	NO. C91-664WD VERDICT FORM (Filed March 28, 1994)

The jury is requested to answer the following questions. The answers will constitute the jury's verdict. As to each question, if the proposition has been established by a preponderance of the evidence, the answer will be yes; if it has not been, the answer will be no.

QUESTION NO. 1: Did a defendant deprive the plaintiff of his constitutional rights in regard to mail?

ANSWER AS TO DEFENDANT WESTON:
___ (~~Yes~~ or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (~~Yes~~ or No)

ANSWER AS TO DEFENDANT KIRCHOFF:
___ (~~Yes~~ or No)

(If you answer no as to each defendant, omit questions 2 and 3 and go to question 4.)

QUESTION NO. 2: Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the

jury in answer to question 1, met constitutional standards?

ANSWER AS TO DEFENDANT WESTON:
___ ~~(Yes or No)~~

ANSWER AS TO DEFENDANT DEHMER:
___ ~~(Yes or No)~~

ANSWER AS TO DEFENDANT KIRCHOFF:
___ ~~(Yes or No)~~

(If the answer is yes as to each defendant, omit question 3 and go to question 4.)

~~*QUESTION NO. 3*: What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 12~~

~~*ANSWER*: ___ (Insert amount in dollars or "None")~~

QUESTION NO. 4: Did a defendant deprive plaintiff of his constitutional rights in regard to visitation (other than conjugal visits)?

Hung 10-2 in favor of defendants

ANSWER AS TO DEFENDANT WESTON:
___ (Yes or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (Yes or No)

(If you answer no as to each defendant, omit questions 5 and 6 and go to question 7.)

QUESTION NO. 5: Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the jury in answer to question 4, met constitutional standards?

ANSWER AS TO DEFENDANT WESTON:
___ ~~(Yes or No)~~

ANSWER AS TO DEFENDANT DEHMER:
___ ~~(Yes or No)~~

(If the answer is yes as to each defendant, omit question 6 and go to question 7.)

~~*QUESTION NO. 6*: What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 4?~~

~~*ANSWER*: ___ (Insert amount in dollars or "None")~~

QUESTION NO. 7: Did a defendant deprive plaintiff of his constitutional rights in regard to conjugal visits?

10-2 in favor of defendants

ANSWER AS TO DEFENDANT WESTON:
___ (Yes or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (Yes or No)

(If you answer no as to each defendant, omit questions 8 and 9 and go to question 10.)

~~*QUESTION NO. 8*: Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the jury in answer to question 7, met constitutional standards?~~

ANSWER AS TO DEFENDANT WESTON:
___ (Yes or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (Yes or No)

(If the answer is yes as to each defendant, omit question 9 and go to question 10.)

~~*QUESTION NO. 9:* What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 7?~~

~~*ANSWER:* ___ (Insert amount in dollars or "None")~~

QUESTION NO. 10: Did a defendant deprive plaintiff of his constitutional rights in regard to conducting strip searches? (This question does not include the alleged probe search, which is dealt with separately.)

ANSWER AS TO DEFENDANT WESTON:
___ (~~Yes~~ or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (~~Yes~~ or No)

(If you answer no as to each defendant, omit questions 11 and 12 and go to question 13.)

~~*QUESTION NO. 11:* Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the jury in answer to question 10, met constitutional standards?~~

~~*ANSWER AS TO DEFENDANT WESTON:*~~
~~___ (Yes or No)~~

~~*ANSWER AS TO DEFENDANT DEHMER:*~~
~~___ (Yes or No)~~

(If the answer is yes as to each defendant, omit question 12 and go to question 13.)

~~*QUESTION NO. 12*: What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 10?~~

~~*ANSWER*: ___ (Insert amount in dollars or "None")~~

QUESTION NO. 13: Did a defendant deprive plaintiff of his constitutional rights by restricting his freedom of movement?

ANSWER AS TO DEFENDANT WESTON:
___ (~~Yes~~ or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (~~Yes~~ or No)

(If you answer no as to each defendant, omit questions 14 and 15 and go to question 16.)

~~*QUESTION NO. 14*: Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the jury in answer to question 13, met constitutional standards?~~

~~*ANSWER AS TO DEFENDANT WESTON*:~~
~~___ (Yes or No)~~

~~*ANSWER AS TO DEFENDANT DEHMER*:~~
~~___ (Yes or No)~~

~~(If the answer is yes as to each defendant, omit question 15 and go to question 16.)~~

~~*QUESTION NO. 15*: What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 13?~~

~~*ANSWER*: ___ (Insert amount in dollars or "None")~~

QUESTION NO. 16: Did a defendant deprive plaintiff of his constitutional rights in regard to access to mental health treatment?

ANSWER AS TO DEFENDANT WESTON:
___ (Yes or ~~No~~)

ANSWER AS TO DEFENDANT DEHMER:
___ (Yes or ~~No~~)

(If you answer no as to each defendant, omit questions 17 and 18 and go to question 19.)

QUESTION NO. 17: Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the jury in answer to question 16, met constitutional standards?

ANSWER AS TO DEFENDANT WESTON:
___ (~~Yes~~ or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (~~Yes~~ or No)

(If the answer is yes as to each defendant, omit question 18 and go to question 19.)

QUESTION NO. 18: What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 16?

ANSWER: $100.00 (Insert amount in dollars or "None")

QUESTION NO. 19: Did a defendant deprive plaintiff of his constitutional rights in regard to educational, vocational, exercise, and recreational opportunities?

ANSWER AS TO DEFENDANT WESTON:
___ (~~Yes~~ or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (~~Yes~~ or No)

(If you answer no as to each defendant, omit questions 20 and 21 and go to question 22.)

~~*QUESTION NO. 20:* Could a reasonable state official or employee in the same circumstances have reasonably believed that the defendant's conduct, as found by the jury in answer to question 19, met constitutional standards?~~

~~*ANSWER AS TO DEFENDANT WESTON:*~~
~~___ (Yes or No)~~

~~*ANSWER AS TO DEFENDANT DEHMER:*~~
~~___(Yes or No)~~

~~(If the answer is yes as to each defendant, omit question 21 and go to question 22.)~~

~~*QUESTION NO. 21:* What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 19?~~

~~*ANSWER:* ___ (Insert amount in dollars or "None")~~

QUESTION NO. 22: Did a defendant conduct, order, direct, or approve a probe search of plaintiff's person in violation of his constitutional rights?

11-1 in favor of defendants

ANSWER AS TO DEFENDANT WESTON:
___ (Yes or No)

ANSWER AS TO DEFENDANT DEHMER:
___ (Yes or No)

ANSWER AS TO DEFENDANT NELSON:
___ (Yes or No)

ANSWER AS TO DEFENDANT ANDERSON-TAYLOR:
___ (Yes or No)

ANSWER AS TO DEFENDANT SIMON:
___ (Yes or No)

ANSWER AS TO DEFENDANT WAHL:
___ (Yes or No)

(If you answer no as to each defendant, omit questions 23 and 24.)

~~*QUESTION NO. 23*: What amount of compensatory damages, if any, is plaintiff entitled to recover for the violation found in the answer to question 22?~~

~~*ANSWER*: ___ (Insert amount in dollars or "None")~~

~~*QUESTION NO. 24*: What amount of exemplary damages, if any, is plaintiff entitled to recover for the violation found in the jury's answer to question 22?~~

~~*ANSWER*: ___ (Insert amount in dollars or "None")~~

Dated: March 28th, 1994.

/s/ Jennifer Renfroe
FOREPERSON

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. MARK SELING, et al., Defendants.	NO. C91-664WD
JERRY R. SHARP, et al., Plaintiffs, v. MARK SELING, et al., Defendants.	NO. C94-121WD
RANDY PEDERSEN, et al., Plaintiffs, v. TIM HILL, et al., Defendants.	NO. C94-211WD
JOHN F. HALL, et al., Plaintiffs, v. LYLE QUASIM, et al., Defendants.	NO. C95-1111WD

RONALD PETERSEN, et al., Plaintiffs, v. WILLIAM DEHMER, et al., Defendants.	NO. C96-415WD FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE MOTIONS HEARD OCTOBER 19-21, 1999 (Filed Nov. 15, 1999)

I. INTRODUCTION

These cases, consolidated for purposes of injunctive relief, involve the conditions of confinement of persons civilly committed as sexually violent predators at the Special Commitment Center ("SCC") at McNeil Island, Washington, pursuant to a Washington statute, RCW ch. 71.09. The SCC is administered by the State of Washington's Department of Social and Health Services ("DSHS"). It is located within the perimeter of the McNeil Island Correctional Center ("MICC"), a prison administered by the Department of Corrections ("DOC"). The plaintiffs are residents of the SCC; the defendants are SCC's superintendent and clinical director.[1] The history of these cases is thoroughly set out in the orders entered on November 25 and December 23, 1998 (Dkt. ## 1026 and 1067 in the

[1] Dr. Mark Seling, the superintendent, has been and remains a defendant. By stipulation of the parties, Dr. Vincent Gollogly, the acting clinical director, is hereby substituted for the recently-resigned Dr. Robert Smith as co-defendant.

Turay case), and need not be repeated here. In brief, the Fourteenth Amendment Due Process Clause requires state officials to provide civilly committed persons with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982). This rule applies to sex offenders, and "[l]ack of funds, staff or facilities cannot justify the State's failure to provide [those confined] with that treatment necessary for rehabilitation." *Ohlinger v. Watson*, 652 F.2d 775, 778-79 (9th Cir. 1980). The *Youngberg* constitutional standard "determines whether a particular decision has substantially met professionally accepted minimum standards." *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.3d 1239, 1248 (2nd Cir. 1984). In the present cases, the departures from professionally accepted minimum standards have been so substantial "as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323. Following a 1994 jury verdict adverse in part to defendants, and findings made by the court, the defendants were enjoined on June 3, 1994, to take certain steps to make constitutionally adequate mental health treatment available to the SCC residents. When progress was slow, a special master – Dr. Janice K. Marques, who had been nominated by defendants – was appointed to assist defendants in achieving compliance and to submit reports to the court. Dr. Marques has not submitted sixteen reports. The court has monitored injunction compliance and has held several hearings on plaintiffs' motions for a finding of contempt and defendants' motions for release from the injunction. On each occasion the court

has found areas of improvement but a continuing failure to afford constitutionally adequate mental health treatment. The findings have concerned the staffing, staff training, treatment plans and programs, and treatment environment at the SCC. The findings and conclusions entered on November 25, 1998, following an evidentiary hearing, culminated in an order enjoining the defendants to take specific steps to achieve compliance with the injunction. The order of December 23, 1998, amended the November 25 order in two respects and denied a stay of the injunction pending defendants' appeal to the Ninth Circuit.

A further hearing on injunction compliance was held in open court on May 18, 1999.[2] The court found again that progress had been made but that the SCC still failed to meet constitutional and professional minimum standards for providing mental health treatment to persons civilly committed, and that the defendants had not yet complied, or substantially complied, with the injunction. The defendants were enjoined to complete the steps required by the order of November 25, 1998, as amended by the order of December 23, 1998; the special master's

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[2] Fed. R. Civ. P. 62(c) provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." A contempt finding may be made, and sanctions imposed, while an appeal from an injunction is pending. *See, e.g., Vac-Air Inc. v. John Mohr & Sons, Inc.*, 54 F.R.D. 580 (E.D. Wis. 1972), citing *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922).

fifteenth report dated May 6, 1999, was adopted as a statement of work remaining to be done. Counsel for defendants stated at the hearing that some of the steps called for by the fifteenth report could be accomplished within several weeks, while others would take until about the end of 1999. Plaintiffs' renewed motion for contempt, and defendants' renewed motion for dissolution of the injunction, were denied. A further evidentiary hearing was scheduled for October 19, 1999, to be preceded by a further report by the special master. *See* Order on Renewed Motions for Contempt and for Dissolution of Injunction, May 27, 1999.

As scheduled, a three-day evidentiary hearing on injunction compliance was held on October 19-21, 1999. Counsel and some plaintiffs were present in person (all plaintiffs were enabled to attend, if they chose to, by a court order issued in advance of the hearing). The motions on which evidence was taken were plaintiffs' motion for contempt and sanctions, plaintiffs' separate motion for contempt regarding the SCC's telephone facilities, and defendants' motion to change the ombudsman provider.

At the October 1999 hearing, defendants did not contend that injunction compliance has been achieved, and did not seek dissolution of the injunction. Instead, they recognized through the testimony of managerial employees, and through counsel, that minimum professional standards for treating sex offenders are not yet fully met and that the goal of providing constitutionally adequate mental health treatment is still unattained.

Defendants' Revised Proposed Findings of Fact and Conclusions of Law, filed on November 1, include the following at page seven: "While defendants have demonstrated progress in a number of areas, they have not yet achieved total compliance with the November 25, 1998 injunction." Defendants' proposed order provides that they "will continue to be enjoined" with certain specific directions. *Id.* at 8. Defendants, however, oppose any finding of contempt or the imposition of sanctions, noting that "[i]t is not unusual for such injunctions to last many years." *Id.* at 1.

The importance of injunction compliance in these cases is underscored by two Washington Supreme Court decisions filed on October 21, 1999, *In re Detention of Turay*, No. 64100-5, 1999 WL 958446, and *Campbell v. Washington*, No. 63986-8, 1999 WL 958445. The state supreme court there declined by 6-2 votes to order two SCC residents released, holding that their remedies of injunctive relief and damages were sufficient and citing the present injunction as demonstrating that constitutionally adequate mental health treatment can be provided. The federal injunction, the state court held, gives residents "an adequate remedy that will guarantee that conditions at the SCC will meet or exceed constitutional standards." *Turay*, 1999 WL 958446 at *19. *See also Campbell*, 1999 WL 958445 at *4 ("Remediation is already ongoing under the direction of the federal district court."

Also of importance is *Young v. Weston*, No. 98-35377, 1999 WL 718467 (9th Cir., Sept. 16, 1999), in which the Ninth Circuit held that while RCW ch. 71.09 is constitutional on its face, conditions of confinement at the SCC could render it punitive as applied, in which event the ex

post facto and double jeopardy clauses could be violated.[3] The issue in the present cases is limited to whether constitutionally adequate mental health treatment is being afforded; that question is related, but not identical, to the question whether the conditions of confinement are punitive for purposes of ex post facto and double jeopardy analysis. The latter issue is not before the court in these cases. Nevertheless, the present injunction proceedings are important not just in their own right but to the above-cited cases and to others brought by SCC residents in state and federal courts.

II. FINDINGS OF FACT

At the October 19-21, 1999, hearing, the court heard testimony from Dr. Janice Marques (the special master), Dr. Mark Seling (the SCC superintendent), Dr. Vincent Gollogly (the acting clinical director), Dr. Robert Smith (the former clinical director), Lee Mosley (the resident advocate), Samuel Elwonger (the Ombudsman), Keith Chiefmoon (the Native American Chaplain), plaintiffs Ronald Petersen and Samuel Donaghe, current and former SCC staff members, and family members of some SCC residents. Exhibits were received in evidence. All parties rested and submitted post-hearing proposed findings and conclusions. The following findings have been established by clear and convincing evidence.

1. Court's Ex. 1, a summary prepared by Dr. Marques for a recent national meeting of the Association for

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[3] The Ninth Circuit granted a motion to stay the issuance of the mandate in *Young* on October 21, 1999.

the Treatment of Sexual Abusers ("ATSA"), sets out the accepted professional standards for providing mental health treatment to persons confined in a facility such as the SCC. It is essentially the same as the professional standards summarized in Finding of Fact 4, pages 11-12, in the order of November 25, 1998. In their testimony at the recent hearing, both the special master and the SCC superintendent confirmed the correctness and applicability of the standards set out in Court's Ex. 1.

2. On October 4, 1999, pursuant to Washington law, an Inspection of Care 1999 Committee Report ("IOC Report") was issued concerning the SCC. The committee members were a certified sex offender treatment provider, the chief operating officer of a child study and treatment center, a clinical nurse specialist, and a psychiatrist. Following inspection visits to the facility, record reviews, and interviews of staff and residents, the committee made findings of deficiencies similar to those found by the court and the special master in the present cases. The IOC report was received in evidence as Plaintiffs' Ex. 1. It adds a further serious concern, that of inadequate medical staff and facilities for the SCC residents. The SCC superintendent has expressed agreement with the findings and recommendations of both the IOC and the special master.

3. Shortly before the October 1999 hearing, the DSHS made several improvements in the conditions at the SCC. These belated changes show that injunction compliance can be achieved if the necessary effort is made. There is still a failure, nevertheless, to meet professional minimum standards and to afford constitutionally adequate mental health treatment. The shortcomings do

not reflect the judgment of any qualified professional; they exist, and have exited, despite uncontradicted professional opinion to the contrary. The evidence establishes the following in regard to the steps required by the November 25, 1998, order as amended by the December 23, 1998, order (the amendments are noted in brackets):

> (a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.

This requirement corresponds to items A and E of the original 1994 injunction, which required defendants to adopt and implement a plan for initial and ongoing training and/or hiring of competent sex offender therapists at SCC and to provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff, including monitoring of the treatment plans of individual residents, and to consult with staff regarding specific issues or concerns about therapy that may arise. The fifteenth report of the special master, approved and adopted by the court, identified four steps needed in regard to this part of the injunction: (1) implement strategies for reducing clinical and residential staff turnover; (2) document how and when remaining staff training will be completed; (3) structure and document the supervision provided to therapists, including specific feedback on delivery of treatment components; and (4) strengthen communication and teamwork between clinical and residential staff.

This requirement has not adequately been met. Some staff members lack the necessary training, and others have received it untimely. Among the results are confusion as to staff roles and, in some instances, inappropriate behavior by staff toward residents. Some residential staff have not been sufficiently trained to understand the SCC's clinical mission. These problems are related to a high turnover rate and to recurring vacancies, some of which still exist. There has been a vacancy since August 1999 in the permanent clinical director's position.

The staff-to-resident population ratio has worsened. The staff includes dedicated and capable people, and recent budgetary approvals for additional positions, and hirings shortly before the recent hearing (including the hiring in August of a full-time executive assistant), show that adequate recruitment and training can be achieved; but at this point neither has been.

(b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.

This requirement corresponds to items C and D of the original injunction, which ordered SCC to implement a treatment program for residents that includes all therapy components recognized as necessary by prevailing professional standards in comparable programs where participation is coerced, including the involvement of

spouses and family members in the treatment of residents, and plans for encouraging the visitation and support of families, and to develop and maintain individual treatment plans for residents that include objective benchmarks of improvement so as to document, measure, and guide an individual's progress in therapy. The fifteenth report of the special master identified four steps needed in regard to this part of the injunction: (1) develop and implement comprehensive, individualized treatment plans that follow a standard format and are approved by the clinical director; (2) ensure that appropriate, individualized treatment is provided to residents with special needs (e.g., major mental disorders, neurological impairments and developmental disabilities), including hiring and/or contracting with experts to provide specialized assessment and treatment planning for these individuals; (3) keep systematic records of resident participation and progress during each trimester, provide specific feedback on performance and clearly specify goals that must be achieved for advancement to the next treatment phase; and (4) further develop the structures (e.g., treatment, supervision and housing options) that are required for community transition and demonstrate their viability.

As noted in the IOC Report, "there has been a definite improvement in the treatment offered." Plaintiffs' Ex. 1 at 8. Treatment plans have improved in both quality and quantity. Nevertheless, as all parties recognized at the recent hearing, the plans for some residents are inadequate in that they fail to address individual histories, lack clarity, and fail to consider those with special needs (perhaps twenty-five percent of the population). As for the

road map to release or to a less restrictive alternative ("LRA"), three residents have advanced recently to Level 5 (the highest being 7), which is a first and is encouraging. But the level system in general remains inadequate and there is still no half-way house (despite the Advisory Board's recommendation) and no systematic program for LRAs. For most residents, there is no clear track to improvement and release. These basic treatment requirements were ordered long ago; the continued failure to achieve full compliance is unexcused.

(c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.

This requirement also corresponds to items C and D of the injunction. The fifteenth report of the special master noted that SCC must ensure that family relationships and support are addressed in treatment plans and that appropriate counseling is provided on a timely basis. The report also referenced the need for SCC to install a system to allow outgoing calls and to assign a social worker to the living unit for the purpose, among others, of increasing family outreach.

Family involvement treatment has been an agreed step from the beginning but is still largely unrealized. Defendants continue to acknowledge its importance but SCC has failed to encourage family support and in many

cases has discouraged it. Testimony from several witnesses at the hearing confirmed the SCC has failed to respond to family members who have asked for assistance, leading family members to feel rejected, out of touch with their confined relatives, and hopeless. Little has been done to develop family support and a social network policy. A July 1999 social event for residents in treatment and family visitors was a success, but remains an isolated occurrence. Dr. Seling testified over a year ago that he would consider ways to involve family members as a way of encouraging residents not in treatment to get involved, yet SCC's policy, adopted in June 1999, makes regular family counseling available only to residents involved in treatment, and nothing has been done to address or encourage family support for the non-treatment group.

> (d) Pending the construction of a separate treatment-oriented facility, to reduce the negative effects of the current connection with MICC by taking the following steps:
>
> (i) Eliminate the routine strip searches of SCC residents following every visit [time for compliance extended to January 22, 1999];
>
> (ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);
>
> (iii) Negotiate with MICC management to obtain better meal and activity schedules, and to eliminate harassment of residents by prisoners; and
>
> (iv) [Negotiate to] acquire more adequate space within the MICC complex, e.g., by

> taking over all of A Unit when new space is needed, with yard space adjacent thereto.

This requirement corresponds to item B of the original injunction, which required SCC to implement strategies to rectify the lack of trust and rapport between residents and treatment providers. The fifteenth report of the special master identified steps needed in regard to this part of the injunction: (1) install a system to allow outgoing calls; (2) negotiate with MICC management to improve conditions including "big yard" access and appropriate segregation conditions; and (3) provide a complete facility planning document (showing each step from now until the new facility is constructed, including population estimates, data on space per resident, an end date for "temporary" overcrowding, and a proposal for separating groups).

A separate treatment-oriented facility is in the planning stages and is expected to be funded by the next legislature, which will convene in January 2000. Given the population growth, such a facility is vital to the SCC's future success and legality. The present population is 95, and the superintendent estimates 115 by the end of this year, with major increases to follow. The tentative site for the new facility is McNeil Island at a location separate from the prison. The IOC Report, Drs. Smith and Seling, and residents' family members all recommend a more accessible location free of any proximity to a prison. The evidence shows that the advantages expected in the April 1998 move from Monroe to McNeil Island (more ample space, use of an infirmary on the island, increased recreational and vocational opportunities, availability of resources at Western State Hospital (which is nearby on

the mainland), and an improved relationship with DOC) have not materialized except for larger space with better views. To the contrary, MICC's pervasive influence has made SCC's mission more difficult than it has to be. But there is expert opinion (including the special master's opinion) that SCC can provide adequate mental health treatment at McNeil Island, both at the present location (assuming that adequate space for the growing population will be provided) and, more easily, when the new facility opens in 2002. That being so, the present record does not justify an order requiring that SCC be located elsewhere. The current need, as stated in the November 25, 1998, order, is to reduce the negative effects of the connection with MICC to the point where constitutionally adequate mental health treatment can be provided. In that regard:

Routine strip searches of residents have been eliminated in compliance with the injunction. The result is to reinstate the policy that prevailed at Monroe.

Defendants have failed to comply with the November 25 order requiring them to eliminate the bar on outgoing telephone calls (other than collect). After the program was relocated to McNeil Island, and until September 1999, residents were able to make only outgoing collect or legal calls. Although SCC could quickly have installed business lines and implemented a system like that in Monroe, it elected not to, deferring to DOC's preference for a system requiring residents to use PIN numbers, and restricting them to making outgoing calls to five pre-approved numbers. Even this limited telephone access is not yet fully implemented. State mental hospitals do not have the restrictions on use imposed by the PIN system;

at Western State, residents can go to a regular pay phone and place calls. SCC's delay in implementing the court's order has made it more costly for residents to contact family members and has had a detrimental effect on residents and their families. SCC still does not have a system that allows incoming calls to be made directly to residents to comply with a state regulation, Wash. Admin. Code § 275-155-050(2)(f).

Defendants have made substantial improvements in meal and activity schedules, and the acquisition of a separate dining room for SCC has brought more reasonable meal times, a reduction of contact between SCC residents and MICC inmates, and twenty-one work stations for employment of residents.

Defendants succeeded on October 11, 1999 – eight days before the hearing – in taking over all of A Unit for SCC, which avoids overcrowding for the moment and permits the separation of residents accepting treatment from those who harass them. This marks the most important step forward since the May 1999 hearing. The living space in A Unit, however, will become inadequate as the population grows.

Yard space is still unduly limited because of MICC's refusal to let residents use the "big yard" after routine strip searches were stopped. The requirement that defendants negotiate with MICC for more adequate yard space is not yet fully met.

Although defendants have made progress in reducing the negative effects of SCC's connection with MICC, the prison's influence remains pervasive and damaging. As one staff member testified, the atmosphere is "always

on yellow." Residents are restricted in their movements by DOC schedules or emergencies, must go through DOC for medical treatment and medications, and are shackled and dressed in prison jumpsuits when they leave the island. Defendants have not made a sufficient effort to separate SCC from DOC influence and control.

> (e) To improve the treatment environment in the following respects:
>
> (i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;
>
> (ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and
>
> (iii) Afford reasonable opportunities to all residents for educational, religious, vocational/work, and recreational activities.

This requirement also corresponds to item B of the original injunction. The fifteenth report of the special master identified steps needed in this regard: (1) revise the grievance process to increase its resolution rate and demonstrate the credibility of the appeal process and clarify, via policy, when mediation services will be employed in grievance and other conflict situations; (2) document that the new policies have undergone a professional review (to ensure that they are consistent with each other and have clear procedures) and review by the resident advocate (to ensure that they are fair and understandable to residents); (3) expand educational, vocational and work opportunities and integrate these domains into the treatment planning process; (4) provide

consistent access to religious activities for all residents; (5) assign a social worker to the living unit, with duties to include increasing social activities, family outreach, and building support networks for residents; (6) ensure that residents with disabilities have access to hobby and recreation, as well as to the law library (e.g., consider CD-ROM editions for the unit); and (7) demonstrate that management is considering and responding to the Resident Advisory Council and focus group input.

The recently-acquired living space (A Unit) now provides the needed separation of residents.

Grievance policies and processing are still too cumbersome and ineffective. Behavior management plans, and segregation in the prison's F Unit, are used too frequently to be consistent with a treatment-oriented environment.

Educational, religious, vocational/work, and recreational activities are still under-provided. A part-time Native American chaplain now is available, but defendants have failed unjustifiably to provide a sweat lodge (an area about fifteen feet square) for Native American religious purposes.

> (f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or other entity.

This uncontested requirement stems from a court order of February 4, 1997, which required external oversight to guarantee that the essential program features operate in practice and not just on paper. The fifteenth report of the special master identified the steps needed:

with the court's approval, fully implement the oversight package recommended by the Advisory board, including clarifying the ombudsman and investigator roles and requiring non-DSHS participation in IOC reviews.

Defendants have now satisfied this requirement. The Governing Body, the Advisory Board, and the IOC are providing external oversight. Internal oversight is provided by the ombudsman and the resident advocate.

> (g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

This basic requirement is still unmet, as shown by the foregoing findings and by the evidence that staff members, on too many occasions, have interacted with residents in unprofessional and damaging ways. Residential as well as clinical staff must act consistently with SCC being a civil-commitment, treatment-oriented facility.

4. In consultation with the special master, the superintendent decided following the May 1999 hearing that certain compliance goals could be met by October and the remainder by about the beginning of 2000. The most urgent attention was to be given to staff training, staff recruitment, treatment plans, measures of progress, facility plans, and oversight. The timetable has not been realized; there are shortfalls as to the goals set for October, and the superintendent in his testimony has estimated that nearly another year – until September 2000 – will be needed before compliance is complete. With nearly a

hundred men in confinement, such a long delay is unacceptable in view of the time already allowed.

5. The failures to comply with the injunction, set forth above, are failures to meet constitutionally required minimum professional standards for the treatment of sex offenders.

6. The ombudsman's role was redefined by an order, stipulated to by all parties, entered on July 23, 1999 (Dkt. # 1170 in the *Turay* case). Defendants now move to replace the current ombudsman, Samuel Elwonger (who was hired with their approval), with an outside private agency, and to change the ombudsman's responsibilities in certain respects. Neutrality is a requirement of the job, and Mr. Elwonger often has seemed more like a partisan than a neutral. He has shown a growing understanding of the job's requirements, however, and his knowledge of and experience with the SCC are valuable. His relations with SCC's management have improved over time. There is no justification for the direction given to some SCC staff members that they should not talk to the ombudsman during working hours. On the assumption that Mr. Elwonger can and will act with full neutrality in the future, the court will deny, without prejudice to its later renewal, defendants' motion to replace him. The proposed changes in the ombudsman's role would move him from outside to inside the SCC chain of command, jeopardizing his neutrality; the motion to make those changes is denied.

7. Bearing in mind that the test for contempt is whether the alleged contemnors have failed to take all reasonable steps within their power to comply with the

injunction, findings must be made as to the causes of the failure to achieve compliance. Based on the evidence received at the October 1999 hearing, and the entire record in these cases, the court finds that the causes have been and are as follows:

(a) The State of Washington, through its DSHS (which operates the SCC) and its DOC (which operates the MICC), has failed to devote the resources necessary to achieve compliance. This is the chief cause. Instead of doing what must be done, the state has treated SCC as an unwanted stepchild of a medium-security prison. Dr. Seling, the superintendent, is dedicated to achieving a successful treatment-oriented program, but neither he nor other staff members can succeed without adequate resources. Dr. Smith, until recently the clinical director, testified that his repeated requests for adequate staffing, other resources, and more freedom from MICC were rejected on budgetary or prison security grounds; eventually, he gave up and stopped making requests. As noted in an earlier order, nothing compels a state to adopt a statute of this nature in the first place and many states have not done so (*see* December 23, 1998, order at 8, n.3); but a state that chooses to have such a program must make adequate mental health treatment available to those committed.

(b) The defendants have fallen into a pattern of first denying that anything is amiss at SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting at the hearing that shortfalls of constitutional magnitude still exist, then returning to denial. For example, Defendants' Reply Brief

filed September 27, 1999, states at page 1 that "defendants believe they have long ago achieved constitutionally adequate treatment for the residents of the SCC. . . . " Yet at the October 19-21 hearing both Dr. Seling and Dr. Smith testified candidly to the contrary – Dr. Smith even used the term "dysfunctional" in describing SCC's program – and defendants now propose that the injunction be maintained at least for the next several months. Parties to litigation are entitled to deny opposing parties' claims and to appeal adverse rulings, but in these cases the entrenched resistance has impeded prompt and wholehearted compliance with court orders protecting basic liberties.

(c) The placement of SCC within the perimeter of MICC continues to make it difficult to achieve a treatment-oriented environment.[4] On issues such as routine strip searches (conducted against the wishes of SCC management and ended only after two court orders were entered), outgoing telephone calls (still a bone of contention), and the use of the "big yard" (unavailable to SCC

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[4] There is a persistent misunderstanding in DSHS as to where the SCC should be located. It is *not* required to be on the grounds of a prison. The error in arguing otherwise was pointed out in the December 23, 1998, order at 6-7. As made clear in that order, the law requires that SCC be a civil commitment facility, not a prison, and be operated by the DSHS, not by the DOC. But the error has surfaced again in the October 17, 1999, Draft Space Program Report of DSHS's consulting firm for the planned new facility, which says at section 2, page 1: "RCW 71.09, through WAC 275-155010, provides that the Special Commitment Center must be located at a secure Department of Corrections operated facility. . . . "

residents because of prison security concerns), MICC continues to have adverse effects upon SCC. The IOC Report states: "The site at present definitely operates more like a correctional facility than a treatment center or program." Plaintiffs' Ex. 1 at 5. As the special master testified, compliance at this location, although difficult, is possible if the necessary effort is made; so far, the full effort has not been made.

(d) After three years of service, Dr. Robert Smith resigned as clinical director in August 1999. His departure followed a long period of discord with Dr. Seling, of which the court was informed only at the October 19-21 hearing. Dr. Smith is a qualified expert in the treatment of sex offenders. The unproductive dispute between the two highest SCC officials, and Dr. Smith's resignation, have hampered the SCC program. Fortunately, Dr. Vincent Gollogly, serving as acting clinical director despite a shortage of credentials as an expert in sex offender treatment, appears to have done an excellent job to date. The evidence supports the resident advocate's report that "Dr. Gollogly has assumed a dynamic and positive role in clinical leadership." Defendants' Ex. A-2 at 1. The search for a permanent clinical director is under way but needs to be expedited.

(e) The task is inherently difficult. The statute, although constitutional on its face under *Kansas v. Hendricks*, 521 U.S. 346 (1997), in practice causes resentment and resistance because it re-confines, for an indefinite period, offenders who have served their sentences and have been released. Successful treatment of sex offenders is no easy task even among those who voluntarily seek it; it is harder yet, by and large, among those

involuntarily committed. But the difficulties have been recognized fully in the generous time already allowed for compliance, and at this point, on this record, do not excuse a further failure to perform.

8. The record in these cases shows footdragging which has continued for an unconscionable time. The court finds by clear and convincing evidence that the defendants have not taken all reasonable steps within their power to comply with the injunction, and have intentionally disregarded the injunction's requirements. Although this conduct does not represent the choice of Drs. Seling and Gollogly, it must be attributed to them as the defendants herein.

9. Compliance should have been complete long ago. The time now estimated by the SCC superintendent to achieve it – September 2000 – is unnecessarily long and would unnecessarily harm the residents. There appears to be no reason why compliance could not be complete in six months following the recent hearing, i.e., by April 2000.

III. CONCLUSIONS OF LAW

1. The court has jurisdiction herein pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

2. The Washington statute involved here, RCW ch. 71.09, is a civil commitment statute. A sex offender, typically one who has served his prison term or is about to complete his sentence, may be detained and the committed under it for an indefinite time. The term "sexually violent predator" is defined as "any person who has been

convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(1). If a committed person petitions for discharge from confinement, the central question is whether his mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged. RCW 71.09.090(1).

3. The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly-committed persons, such as these plaintiffs, with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. *See Youngberg*, 457 U.S. at 319-22; *Ohlinger*, 652 F.2d at 778. Moreover, defendants have a duty to provide plaintiffs with "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 322. Recognizing these requirements, the Washington statute provides that "[a]ny person committed pursuant to this chapter has the right to adequate care and individualized treatment." RCW 71.09.080(2).

4. The state, however, "enjoy[s] wide latitude in developing treatment regimens [for sex offenders]," *Hendricks*, 521 U.S. at 368 n.4, and "liability [on a claim of constitutional deprivation] may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice,

or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg,* 457 U.S. at 323 (1982).

5. As set out in the foregoing findings of fact and in earlier orders, the defendants persistently have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment.

6. Injunctive measures ordered against a state agency or official ordinarily must be no broader than necessary to remedy the constitutional violation, but a remedy may go beyond the precise terms of the specific violation "when there is a record of past constitutional violations and violations of past court orders." *Gary v. Hegstrom,* 831 F.2d 1430, 1433 (9th Cir. 1987) (citing *Hoptowit v. Ray,* 682 F.2d 1237, 1247 (9th Cir. 1982)). The court may "order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy constitutional violations." *Gluth v. Kangas,* 951 F.2d 1504, 1510 n.4 (9th Cir. 1999) (citing *Toussaint v. McCarthy,* 801 F.2d 1080, 1087 (9th Cir. 1986)). The orders of November 25 and December 23, 1998, and May 27, 1999, listed specific steps to be taken that were within the scope of the injunction as originally issued.

7. In the respects set forth in the findings of fact, defendants have continued to violate the injunction herein and the implementing orders of November 25 and December 23, 1998.

8. The test for determining contempt is "whether the defendants have performed 'all reasonable steps within their power to insure compliance' " with the order. *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992). The contempt "need not be willful." *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987). "[T]here is no good faith exception to the requirement of obedience to a court order." *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998). The party alleging civil contempt must demonstrate by clear and convincing evidence that parties to be held in contempt violated the court's order. *Federal Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). The burden then shifts to the alleged contemnors to demonstrate why they were unable to comply. *Id.* A party's inability to comply with a court's order constitutes a defense to a charge of civil contempt. *Id.*

9. The record shows by clear and convincing evidence that defendants have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction's requirements. There is no showing that the defendants are or have been unable to comply. Accordingly, the defendants are now held to be in contempt of court.

10. The purpose of civil contempt sometimes is not to punish but "to coerce the defendant into compliance with the court's order, and to compensate the complainant for the losses sustained." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992); *see also International Union, United Mineworkers of America v. Bagwell*, 512 U.S. 821, 829 (1994). While the court must use the "least

possible power adequate to the end proposed," *Spallone v. United States*, 493 U.S. 265, 276 (1990), it also "must consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Whittaker*, 953 F.2d at 516. Defendants' footdragging is an important factor in weighing the use of a contempt sanction. *See Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 476-77 (1986) (upholding affirmative action plan and fine imposed by the district court and stating that "[i]n light of petitioners' long history of 'foot dragging resistance' to court orders, simply enjoining them from once again engaging in discriminatory practices would clearly have been futile.").

11. The present injunction is five and one-half years old and the defendants have been given repeated opportunities to comply without sanctions being imposed. It is now clear that sanctions are essential. The primary sanction requested by plaintiffs – that all SCC residents be ordered released – is not justified at this point as a measure to induce compliance. It is therefore not necessary to decide whether release could be ordered in a civil rights case such as this as distinguished from a habeas corpus case. *See, e.g., Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Financial sanctions should be sufficient, and, in view of defendants' recent belated efforts to improve the SCC's treatment practices and environment, should be deferred for six months from the time of the last hearing to afford a final opportunity to comply.

12. A sanction for "[c]ivil contempt is characterized by the court's desire to compel obedience to a court order

or to compensate the contemnor's adversary for the injuries which result from the noncompliance." *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983). The amount of a compensory contempt fine is in the discretion of the court. *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980). The appropriate sanction here is a payment of $50 per day per resident confined on that day (which, with about 100 residents, would equal roughly $5000 per day), to be paid into the registry of this court for subsequent disbursement, pursuant to court order, to the residents or for their benefit. For the sanction to be effective, the parties must be assured that it will not be nullified by a state claim for the cost of each resident's custody. The state has used a threat of such recoupment as a means of discouraging damages claims by residents. *See* Plaintiffs' Ex. 14. Therefore, the sanction payments will not be subject to a lien or claim by the state for costs of confinement, evaluation, or care pursuant to RCW 71.09.110, Wash. Admin. Code § 275-155-060, or any other statute or regulation. The sanction amount will be due for each day commencing May 1, 2000, unless the court sooner determines that injunction compliance is complete or substantially complete, and will be paid monthly, for the preceding month, beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed.

13. This order will not preclude the imposition of other sanctions should defendants continue to violate the injunction.

IV. ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ordered that:

1. Plaintiffs' motion for a finding of contempt of court and for the imposition of sanctions is granted. Defendants are held to be in contempt of court for having failed to take all reasonable steps within their power to comply with the injunction herein by making constitutionally adequate mental health treatment available to the SCC residents.

2. A civil contempt sanction is hereby imposed as follows: Defendants shall pay into the registry of this court a sanction of $50 per day per resident confined at the SCC on that day, which amount will be due for each day commencing May 1, 2000, unless the court sooner determines that injunction compliance is complete or substantially complete. The sanction will be paid monthly, for the preceding month, beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed. The sanction proceeds will be disbursed, pursuant to court order, to the residents or for their benefit, and will not be subject to a lien or claim by the state for the costs of confinement, evaluation, or care pursuant to RCW 71.09.110, Wash. Admin. Code § 275-155-060, or any other statute or regulation.

3. Plaintiffs' separate motion for a finding of contempt as to the changes required in the SCC telephone system is granted. This being an item of injunction compliance within the scope of paragraphs 1 and 2, above, no separate sanction will be ordered.

4. Defendants' motion to replace the ombudsman is denied without prejudice to its renewal in the event of any future demonstrated lack of neutrality on the ombudsman's part, or for other cause.

5. Defendants again are enjoined to comply fully with the injunction herein, as detailed in the orders entered on November 25 and December 23, 1998, and in doing so to use the assistance provided by the special master.

6. A further report by the special master will be due on April 12, 2000. A hearing as to injunction compliance will be held at 8:45 a.m. on April 18, 2000. Any party may move for contempt, dissolution of the injunction, or other relief before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, the pro se plaintiffs, amici curiae, and the special master.

Dated: November 15, 1999.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge